THE UNIVERSITY OF WINCHESTER

Faculty of Business, Law and Sport

Risk Assessment in Litigation

David James Chalk

Doctor of Philosophy by Works in the Public Domain

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Table of Contents

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ABSTRACT FOR THESIS

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This thesis consists of this volume together with the book Risk Assessment in Litigation published by Butterworths in 2001. The research presented as a whole represents work conducted over the period from 1999 to 2013 focussing on the assessment of risk in civil litigation in England and Wales in the context of conditional fee agreement and after the event insurance. The published works that form part of the thesis collectively present 'doctrinal' and 'empirical' legal research, terms considered in the light of the published works and the research underlying them.

The initial research project commenced in 1999 and was funded by the European Social Fund, Blake Lapthorn solicitors and Litigation Protection Limited (an insurance intermediary). That project researched the question of whether and if so how a method or methods of risk assessment could be devised that could form the basis of a training programme for litigation solicitors. The outcomes of that research were a set of risk assessment methods that were later formed into a

continuing professional development format and delivered across England and Wales. The methods were also incorporated into the book *Risk Assessment in Litigation* and into *Butterworths Costs Service*. The thesis sets out via the published works that a positive answer can be and was given to the initial research question. Part of that answer involves defining and researching tacit knowledge and the difficulties inherent in the transfer of tacit knowledge all of which is explored in chapter four: What is legal research?

The present volume develops the topic of probability theory as applied to risk assessment in litigation and reviews the treatment of that topic in the original publication Risk Assessment in Litigation and takes the debate further in light of the decision of the Court of Appeal in *Motto & Ors v Trafigura Ltd & Anor* [2011] EWCA Civ 1150 where the book is cited in the judgment of Lord Neuberger MR.

The research presented in this thesis also consists of detailed analysis of the law relating to the funding of civil litigation under conditional fee agreements and after the event legal expenses insurance. Over the period 1999 to 2013 the published works show a development of the law in this field and a change in government policy in respect of the regulation of conditional fee agreements with attendant changes to the law and therefore the practice of litigation. The impact on risk in litigation of these changes is considered in detail in the published works.

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    - David Chalk, 'Costs: Part 36 Offers and Late Acceptance' (2011) 30 CJQ, Issue 2, 133 (Sweet and Maxwell)
    - David Chalk, Solicitor client costs indemnities: unregulated insurance or benign assistance? (2013) J.B.L, 1, 59-76 (Sweet and Maxwell)
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    - D Chalk, 'Sounding the retreat' (2002) S.J. 146(35), 831-832. (Wilmington Publishing & Information Ltd.)
    - David Chalk, 'CFAs after 1 November - a brave new world?' (2005) 155 NLJ 1742 (LexisNexis)

Dedication

To my wife Caroline and my son Nicholas.

Acknowledgements

It is with great pleasure that I acknowledge the assistance given to me by my Director of Studies, Professor David Birks, my supervisor Professor Alan Murray and by Helen James, Carol Kilgannon, Marion Oswald and Professor Anat Scolnikov of the Department of Law at the University of Winchester whose support, encouragement and enlightened comments have been invaluable.

I am also grateful for the kind permission of the publisher to include Butterworths Costs Service as a part of this thesis.

Lastly I express here my love and thanks to my wife and son to whom this thesis is dedicated and without whose love and support the original work would not have been possible.

Introduction and Overview

This PhD thesis represents a research and publication journey over the period 1999 to 2013. The journey has sought to explore the question of how risk in litigation can be assessed by a lawyer faced with the decision whether to take the case on under a conditional fee agreement (CFA). The journey began in 1999 before a change in government policy which was to have a profound effect on the operation of CFAs. The change of policy saw a massive shift of the risk in litigation away from public funding via legal aid and onto the solicitor running the litigation. That change was brought into effect in April 2000 alongside a momentous change in the costs rules that enabled the success fee under a CFA to be recovered from the losing opponent.

The initial question then of how risk in litigation could be assessed took on a new life with the need for solicitors to at least break even across their CFA funded cases. This meant firstly assessing cases accurately enough that sufficient cases won and secondly that in those cases that won a sufficient success fee was recovered to compensate for the absence of any fees in the cases that lost.

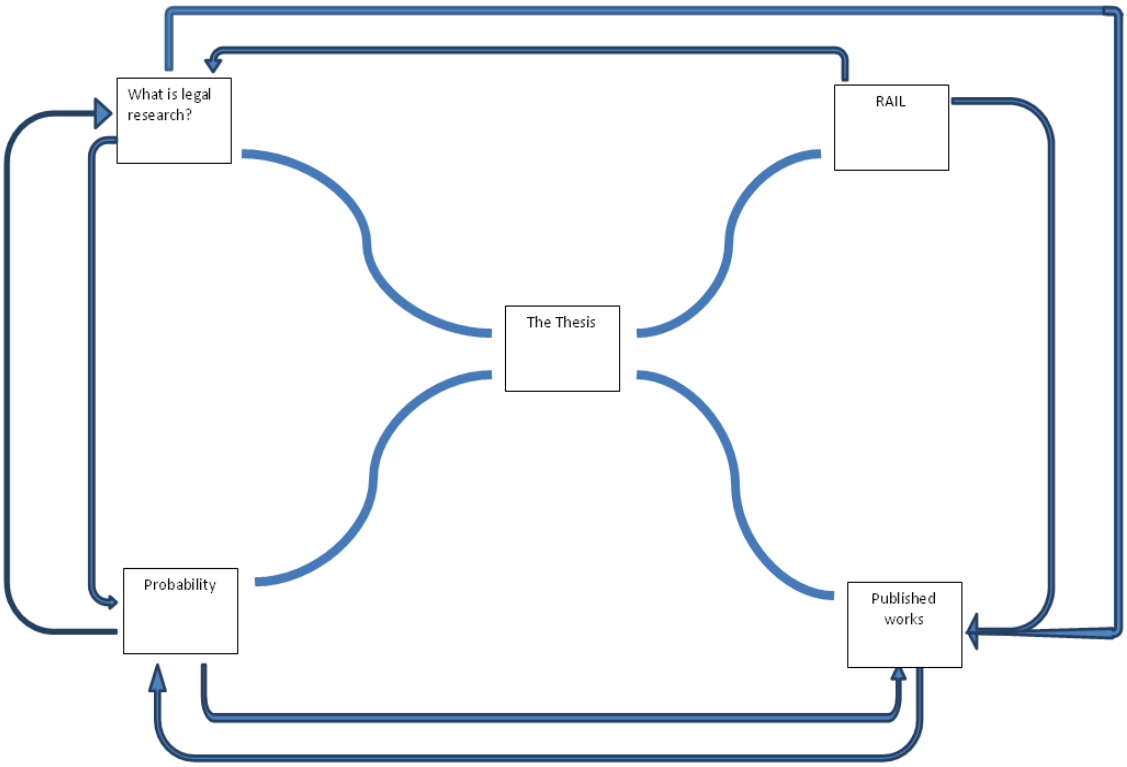
Almost as soon as the changes were commenced in 2000 the challenges began from losing opponents, notably the insurers of losing defendants to personal injury claims. The period from 2000 to 2003 saw an at times frantic development in the law and practice relating to CFAs. The initial publication in 2000 of Risk Assessment in Litigation[1] was thus soon in need of updating[2] and that was achieved through Butterworths Costs Service (BCS)[3] and thus was begun the evolving work of maintaining the division of BCS concerned with litigation funding. In addition journal articles were published that focused on particular developments in the field especially in 2003 and 2005. The journey continued and in 2011 as a direct consequence of Risk Assessment in Litigation I was asked to advise on the costs litigation in *Trafigura*[4] with the result that arguments were put to the Court of Appeal as to

[1] David J Chalk *Risk Assessment in Litigation* (Butterworths 2001)
[2] David J Chalk, *Risk Assessment in Litigation Supplement* (Butterworths 2002)
[3] *Butterworths Costs Service – Division E – Litigation Funding*.
[4] *Yao Essaie Motto v Trafigura* [2011] EWCA Civ 1150

the assessment of risk in litigation and the methods used to support success fee levels culminating in the book being cited in the judgment of Lord Neuberger MR[5]. The most recent published work[6] concerns the interplay between the regulation of insurance and the provision of litigation services by solicitors and that article addresses the tension between the approach to the regulation of insurance contracts and the latest change in government policy towards the funding of litigation which, it is argued, seeks to place still further risk onto the solicitor.

The thesis is divided into four chapters which together form a contextual statement that supports the published works. The arrangement of the chapters follows as far as possible the chronology of the work. Thus chapter one sets out the initial phase of research conducted with funding from the European Social Fund and match funding by Blake Lapthorn and Litigation Protection Limited. Chapter two reviews the published works themselves and chapter three explores the major topic of probability theory in the context of risk in litigation. Chapter four considers the question 'what is legal research' and seeks to answer that question by reference to current thinking and to the research that is reflected in the published works. There are, however, links between each chapter so that the thesis as a whole is engaged throughout not only with risk assessment in litigation but with legal research processes. This interlinking is illustrated in the following diagram:

[5] *Yao Essaie Motto v Trafigura* [2011] EWCA Civ 1150 at [123]
[6] David Chalk, Solicitor client costs indemnities: unregulated insurance or benign assistance? (2013) J.B.L, 1, 59-76



The published works have a cut-off date of January 2013 but the topicality of risk assessment in litigation continues and in some respects has become even more acute following the changes to litigation costs law commenced on 1 April 2013[7]. Future work will therefore focus on the new landscape for litigation funding but will also build out from the work on probability theory to explore loss of chance cases where the theoretical basis for claims in professional negligence, and in particular clinical negligence, is open to question.

[7] Legal Aid, Sentencing and Punishment of Offenders Act 2012.

Chapter 1

Risk Assessment in Litigation the "RAIL" Project

The published works forming this PhD thesis all stem from a research project conducted in 1999/2000 entitled Risk Assessment in Litigation which became known by its acronym the RAIL project (hereafter referred to as RAIL). RAIL was funded by the European Social Fund (ESF)[8] and match-funded[9] by Litigation Protection Limited (LPL)[10] and Blake Lapthorn[11]. ESF Objective 4 aimed to respond to changing skills needs in the labour market as a result of 'industrial change'[12]. The Key Priorities[13] of Objective 4 were set out as follows:

(1) To develop anticipation tools that inform the development of training programmes. (ESF - ECU 34,4 million)

Priority 1 will support two main strands of activity:

· Anticipation of changes in the labour market at national, regional and local level

· Company level skill analyses

(2) To target training on those individuals within companies who do not have relevant up to date skills and who risk becoming unemployed. (ESF support ECU 172,4 million)

Priority 2 will support two main strands of activity:

· Training and development for key individuals

· Training and development for target groups within the workforce

[8] RAIL was funded under ESF Objective 4 with direct funding from the ESF of £92.333. In 1999 Objective 4 received 224 applications to the value of £15 million with a total of 100 applications being approved (source ESF News Issue 14, July 1999).

[9] The ESF project was funded on the basis that any funding from the ESF was to be matched by funding in money or time by funding partners and on the basis of the time costs of those engaging with the project.

[10] LPL was an insurance intermediary specialising in 'after the event' legal expenses insurance.

[11] Blake Lapthorn is a leading firm of solicitors in the South East of England.

[12] Great Britain: European Social Fund Objective 4 European Commission - IP/98/238 11/03/1998

[13] ibid

(3) To fund the development of innovative training systems; to encourage improved networking between SMEs and SMEs and large firms and the dissemination of results of research carried out in the first priority. (ESF support ECU 35,9 million)

Priority 3 will support two main strands of activity:

· Development of new training systems

· Improved networking

The RAIL project engaged with Priority 3.1: the development of new training systems. The rationale was the potential impact on employment of the removal of legal aid from personal injury claims which was to be implemented from 1 April 2000. Government policy was to move the funding of such claims into the private sector. To facilitate that the success fee charged under conditional fee agreements and the insurance premium for after the event legal expenses insurance would become recoverable costs from a losing opponent. The need therefore was to provide a new training system for solicitors especially in the SME sector who would now be taking the financial risk of cases that failed. The RAIL project had first to design such a training system and then deliver it to solicitors from the target sector of SME firms. The direct ESF funding included salary costs for one academic year, the cost of the initial research stage (publicity and travel costs), venue hire and materials provision for training workshops and devolvement costs in respect of an IT based risk assessment method. The project was funded for one year ending 30 June 2000.

The initial idea for the RAIL project arose in the course of work I was doing with Litigation Protection Limited (LPL) who became one of the match funders. In 1998-1999 CPD courses were provided with LPL for solicitors to support their use of LPL insurance products which were themselves designed to support clients who had conditional fee agreements. Prior to April 2000 the client was responsible for the premiums for after the event legal expenses insurance and the solicitors were at risk of receiving no fees if the case lost. There was therefore already a market where solicitors were conducting privately funded personal injury litigation using CFAs. What was to change in April 2000 was the removal of legal aid which for most SME sector firms was a guaranteed income stream. The mixed market of

publicly funded work and some CFA privately funded work would be replaced by a wholly private market.

From the experience of the CPD workshops that had been delivered in 1998-9 with LPL it was evident that risk assessment was a crucial element of running cases on a CFA but that there had been no training available in risk assessment hitherto. Solicitors had at no point in their training been introduced to the concept of risk assessment and indeed the alignment of financial risk with the prospects of success in the case was a new phenomenon, CFAs being only permitted since 1995. RAIL therefore had first to research the risks in litigation and to then devise a training method that could be rolled out across the profession. There were three stages to the project: firstly to research the skills need of solicitors; secondly to design a training system that would enable the skills to be acquired; thirdly to develop an IT support system for use in both training and practice.

The first stage was itself then broken down into three further proposed stages: 1. case review and discussion with LPL; 2. Case review and discussion with Blake Lapthorn litigation department; 3. Questionnaire to litigation solicitors in England and Wales. The first of these was commenced immediately the successful outcome of the bid was known in May 1999. That first stage explored the potential for closed cases to be a source of research. It quickly became apparent that the time needed for such a research stage would not be available and that there would be potentially insurmountable confidentiality issues. As a result the RAIL research would be a qualitative methods study utilising the expertise of the two match funders and then extending the research to litigation solicitors across England and Wales. Case review was replaced therefore at both LPL and Blake Lapthorn with in depth interviews with relevant members of those organisations. The questionnaire design was carried out in the light of the interview findings and was piloted with some of the firms who were clients of LPL. This method was however thought unworkable if it was intended that a sufficiently high number of returns would be achieved for the results to give rise to the ultimate outcome of the project, namely a risk assessment method that could be disseminated to practitioners. Ultimately the decision was taken to move to interviewing litigators at a number of firms and the trialling of ideas through CPD workshops with Blake Lapthorn.

I was very fortunate to be provided with the assistance of the marketing department of LPL in publicising the project to the profession and in obtaining interview appointments. Small brochures were designed and sent out in large mail shots to LPL client firms and via firm lists purchased from the Law Society. The Sole Practitioners Group endorsed the project and was a further means of publicising the project. A formal launch took place on 21 October 1999 at Lloyds of London with over 100 attendees and with addresses from the Parliamentary Secretary to the Lord Chancellors Department, David Lock MP and the Vice President of the Law Society, Michael Napier.[14]

Delivery of the RAIL project is represented in the following table:

August 1999	Cards publicising the RAIL project sent to several thousand litigation solicitors in England and Wales. The Law Society database of solicitors was used as the sampling frame to obtain details of litigation solicitors.
	Respondents to publicity cards were collected. This card simply indicated a willingness to complete a postal questionnaire.
	Postal questionnaires sent to respondents.
	Questionnaires returned. And reviewed leading to the decision to use questionnaires only as contact point for interviews and not as a source of data for analysis.
October 1999	Semi-structured interviews with members of the two match funders. Litigation solicitors at Blake Lapthorn and qualified lawyers at LPL were interviewed for up to an hour as a first stage in developing the interview method. Set questions were used with time allowed for open discussion based on responses.
	Semi-structured interviews with respondent litigation solicitors – mainly in South East England / East Anglia. Some 50 interviews were conducted of up to one hour each with the objective of obtaining data as to the factors litigators saw as producing risk.
	Preliminary findings delivered to Risk analysis conference November 1999 with positive feedback as to the deconstruction of litigation in terms of

[14] The involvement of the Department for Constitutional Affairs was significant and the project was later referred to by the Lord Chancellor (Lord Irvine of Lairg) in the House of Lords – Lords Hansard 2 Mar 2000: Column 653.

	risk. This conference led to an invitation to publish a risk assessment methodology as part of Butterworths Personal Injury Litigation Service.
January 2000	Trialling of risk assessment factor list method: Blake Lapthorn workshop January 2000. This led to a major development of one of the three methods for assessing risk that were to become the final outcome.
	RAIL CPD workshop stage across England 2000: 103 firms participated and 319 individuals at a series of workshops limited to 20 attendees at each event.
	Pilot IT based risk assessment tool developed and tested. Practitioner resistance based on IT skills and equipment limitations led to a decision to amend the RAIL proposal to exclude this element.
July 2000	RAIL project closed July 2000
	Programme of CPD workshops 2001

Access to litigators across fields of litigation such as personal injury, clinical negligence and insolvency was achieved through the combination of various marketing initiatives. Interviews were conducted with litigation solicitors from firms ranging from sole practitioners to major regional and national firms. Whilst the initial impetus for the RAIL project had been personal injury litigators where the April 2000 change was most acute, the relevance to other fields of litigation became evident at an early stage and enabled RAIL to broaden. Indeed testing whether the methods of risk assessment that were emerging could translate to fields other than personal injury was a major breakthrough for the RAIL project. If methods of risk assessment could be transferred across types of litigation the stability and integrity of those methods would be enhanced.

Stage two of the project was the critical step of translating the material gathered through interviews into a risk assessment design. At this point there was a need to merge empirical research findings with doctrinal legal research so as to recognise risk factors inherent in the law as well as those emanating from the litigation process itself. Stage three of the project to some extent overlapped with stage two in that early workshops were used to test findings and trial methods of assessment. The opportunity was also taken to present

preliminary findings to two national conferences[15] which were invaluable opportunities to engage with practitioners wholly independent of the project. The risk assessment methods were further tested in a specially arranged workshop with litigators at Blake Lapthorn in January 2000 which proved to be an immensely powerful method for the project as a whole. By this point with less than six months remaining for the project it was possible to bring together all of the materials gathered in questionnaires[16], interviews and from the CPD[17] events. This focussed workshop enabled an evaluation to be made of the readiness or otherwise of the methods of risk assessment that had been developed thus far and as to whether these could be used in a training setting. It was at this event that one of the methods was finalised by adopting for the first time a ranking method for risk factors which required users to rank the top and bottom factors in pairs out of 18 risk factors. This proved at the time and subsequently at further workshops to be a very efficient method of ranking a large number of factors and it lent itself also to stage 4 of the project which was aimed at providing an IT based support system. The outcome of the workshop was very positive and the decision was taken to launch the third stage of the project of providing training workshops across the country.

Three risk assessment methods[18] had been developed and were then incorporated into a training workshop with written materials including realistic case studies to which the methods could be applied during workshops. The format of the workshop followed that which had been trialled with Blake Lapthorn. Each participant in a RAIL workshop was a

[15] Medical Litigation Roadshow – Law Society's Hall 18 February 2000 and Central Law Training's conference Risk Analysis 8 November 1999. The latter was chaired by Iain Goldrein QC, general editor of Butterworths Personal Injury Litigation Service, who invited me to write a division for that service to be entitled Risk Assessment – that publication led to the commissioning by Butterworths of David J Chalk *Risk Assessment in Litigation* (Butterworths 2001)

[16] Although the use of questionnaires as a main method had been replaced at an early stage there was nonetheless some useful data gathered from those questionnaires that had been returned.

[17] CPD events, especially those organised by providers external to the research (such as the two referred above) are an invaluable research method in themselves – see Chapter Four What is Legal Research.

[18] The methods are included in David J Chalk *Risk Assessment in Litigation* (Butterworths 2001) Ch.21 Methods of Risk Assessment.

'beneficiary'[19] in ESF terminology and their participation also provided further match funding. Workshops were run across the country[20] with 103 firms participating and 319 individuals. The opportunity to run the RAIL methods through so many practitioners in a CPD setting was itself an enormously powerful research tool that enabled the findings of the early stages of the project to be fully tested. A further intended output of the ESF RAIL project was the development of a pilot IT based support. Early responses to the use of such a mechanism were unfavourably because at that time the target sector of SME firms did not possess the IT systems and competencies needed to make use of such a tool. Nonetheless some development work was done and following the conclusion of the ESF funded project further development of a CD ROM was conducted by one of the match funders and was adopted by a major personal injury firm.

In addition to being invited to contribute to the major practitioner work Butterworths Personal Injury Litigation Service[21] a further early impact of the RAIL project was an invitation from the Law Society to advise on the criteria it would publish for the compulsory training of members of the Law Society Personal Injury Panel. The RAIL project findings were fed directly into a meeting at the Law Society which produced a set of criteria against which training in risk assessment would be accredited[22]. The greatest impact of the RAIL project was the successful proposal to Butterworths to publish the main work in this PhD thesis - David J Chalk *Risk Assessment in Litigation* (Butterworths 2001). This built on Division XX of Butterworths Personal Injury Litigation Service and extended risk assessment to all fields of civil litigation, including insolvency litigation. This in turn led to an invitation

[19] Beneficiaries were litigators from the SME sector which was the target sector for ESF Objective 4.
[20] Leeds, Chelmsford, London, Manchester, Exeter, Reading, Cambridge and Tunbridge Wells.
[21] First published in 1988 the Service was re-launched in 1999 in readiness for the coming into force on 26 April 1999 of the new Civil Procedure Rules which resulted from the Woolf Report. This is a six volume loose-leaf work and Division XX Risk assessment and Conditional Fees has been included since 2000 to date.
[22] One day workshops with this Law Society accreditation were then delivered in June, July and September across the country following the publication of *Risk Assessment in Litigation*.

to contribute a new Division to Butterworths Costs Service[23] entitled Litigation Funding and that in turn led to an invitation to contribute to the leading text on civil costs – Cook on Costs[24].

[23] A two volume loose-leaf work, general editor His Honour Michael Cook – Division E Litigation Funding has been included since 2001 to date. The 2012 content of Division E forms part of the published work of this PhD thesis.

[24] Michael J Cook, *Cook on Costs* was first published in 1991 and moved to an annual format from 2000. D Chalk was a contributor to chapters covering conditional fee agreements and litigation funding for all annual editions from 2001 until 2013.

Chapter 2

The Published Works

The published works[25] span the years 2001 to 2013 and constitute a sustained and original contribution to the understanding of the law and its application as it relates to the funding of litigation in England and Wales during that period. The funding methods upon which the work focuses are Conditional Fee Agreements (CFAs) and After the Event insurance (ATE). The works can be understood against the backdrop of major change in the legal regulation of solicitors and barristers in the provision of legal services and the following time line illustrates the significant activity over the period and the relationship of the published works.

Date	Significant event	Published work	Scope of work
1999	Government policy change – announcement to remove legal aid from major areas of litigation – Conditional Fee Agreements (CFAs) to be the main method of financing litigation. Success fees and ATE		RAIL project – funded by the European Social Fund with match funding from Blake Lapthorn solicitors and Litigation Protection Limited – insurance intermediary.

[25] Further major practitioner works not being submitted because of overlap with the submitted work are Butterworths Personal Injury Litigation Service – Division XX Risk Assessment and Conditional Fees (D Chalk contributing editor since 2001 to date) and Michael J Cook, *Cook on Costs* – D Chalk contributor to all annual editions from 2001 to 2013.

	insurance premiums to be recovered from losing opponents.		
2000	Access to Justice Act 1999 comes into force	2000 to date: Contributing editor Butterworths Costs Service – Division E – Litigation Funding.	Now in excess of 84,000 words this practitioner work covers the entire period from the Access to Justice Act 1999 to date.
2001		David J Chalk, *Risk Assessment in Litigation* (Butterworths 2001)	The new law relating to CFAs and major section on risk assessment methods based on the RAIL project
2002	*Callery v Gray* [2001] EWCA Civ 1117 *Callery v Gray (No 2)* [2001] EWCA Civ 1246 *Sarwar v Alam* [2001] EWCA Civ 1401	David J Chalk, *Risk Assessment in Litigation Supplement* (Butterworths 2002)	42 page analysis of these Court of Appeal decisions which were the first at that level to consider the new law.
2002-5	The 'costs war' – very considerable	D Chalk, 'Sounding the retreat' (2002)	Article with critical analysis of a Court of

	case law developed concerning CFAs	S.J. 146(35), 831-832. David Chalk, 'CFAs after 1 November - a brave new world?' (2005) 155 NLJ 1742	Appeal decision apparently retreating from Callery v Gray Article analysing the decision in *Garbutt v Edwards* [2005] EWCA Civ 1206 as it related to CFAs
2003	The Conditional Fee Agreements (Miscellaneous Amendments) Regulations 2003, SI 2003 No. 1240	David Chalk, 'As simple as CFA' (2003) S.J. 2003, 147(21), 614-615.	Article analysing the introduction of a simplified form of CFA under a new set of regulations
2005	Revocation of CFA Regulations 2000		
2007	Change to CPR Part 36		
2010	Review of Civil Litigation Costs: Final Report, Sir Rupert Jackson		
2011	Legal Aid, Sentencing and Punishment of Offenders Bill – to implement the		

	Jackson Report		
		David Chalk, 'Costs: Part 36 Offers and Late Acceptance' (2011) 30 CJQ, Issue 2, 133	Part 36 creates one of the major risks in litigation and is especially relevant to CFAs
		David Chalk, 'Part 36: a game of trumps' (2011) L.F., 76 (Dec), 20-21	A critical consideration the proposed changes to Part 36 and CFAs
	Yao Essaie Motto v Trafigura [2011] EWCA Civ 1150	Court of Appeal judgment of the Master of the Rolls Lord Neuberger refers to David J Chalk, *Risk Assessment in Litigation* (Butterworths 2001)	This case concerned the use of probability theory in risk assessment. Consultancy advice provided based on the book was accepted by the Court of Appeal. This is the largest costs case in financial terms ever seen in England and Wales.
2012	Legal Aid, Sentencing and Punishment of Offenders Act 2012 passed –in force	David Chalk, Solicitor client costs indemnities: unregulated insurance or benign	Article based on conference paper presented to Southampton University Insurance

	from 1 April 2013	assistance? (2013) J.B.L, 1, 59-76	Law Research Group's first annual Insurance Contract Law Reform Academic Conference, hosted at Norton Rose LLP in London 16 April 2012 Considers case law in the field of CFAs that sits uneasily with case law in the field of insurance.

Aims of the Published Works as a whole

The aims of the published work are twofold and were established in 1999 in the RAIL project. The aims of the collected work are firstly to provide a scholarly exposition of the law as it relates to CFAs and ATE insurance and secondly to provide a critique and guidance on the assessment of risk in litigation.

The following extract from the Preface to *Risk Assessment in Litigation*[26] sets out the aims of that publication and they are an apposite description of the aims that have been continued since then throughout all of the published work:

> *This book is in large measure the result of a research project funded by the European Social Fund with the generous match funding of Blake Lapthorn*

[26] David J Chalk, *Risk Assessment in Litigation* (Butterworths 2001)

Solicitors and Litigation Protection Limited. That project attempted to discover how litigators do, or might, assess risk. The work was carried out in the context of conditional fee agreements but it is apparent that the discipline of risk assessment in litigation is by no means confined to that context.

The book therefore brings together the main points of focus in the modern world of litigation, namely CFAs, insurance, funding and risk. The aim in particular is to get the idea of risk assessment onto the agenda by suggesting aims and methods. Additionally the world of insurance in the context of litigation is presented as recognition of the fundamental role it now plays, as does the provision of funding. The reforms in the funding of litigation have taken little more than 5 years to reach the point now where significant opportunities have been created across the whole spectrum of litigation. Necessarily the statutory regime has increased in complexity and the approaches which individual legal practitioners are able to take have increased markedly. There is no single type of funding arrangement, even if one confines the search to CFAs. I have attempted therefore to resist any temptation to favour one approach over another and have instead sought to provide the materials needed to support a thoughtful decision process.

The context for the linkage between all of the public works is the change in the law brought about by the Access to Justice Act 1999, the recoverability of additional liabilities[27] and the very complex body of law that developed as the new funding method was used by the profession. Considerable case law developments over the period ensured the continued relevance of the work and indeed required that via the Butterworths Costs Service the work continued and kept pace with the changes to the law subsequent to 2001. 2010 saw the publication of the Jackson Report[28] paving the way to a return to a pre-1999 Act regime and therefore a return to the significance of risk assessment once success fees

[27] The phrase 'additional liabilities' encompassed success fees under a Conditional Fee Agreement and /or a premium in respect of an After the Event insurance policy. These additional liabilities were recoverable from a losing opponent under changes made by the Access to Justice Act 1999.

[28] Rupert M. Jackson, *Review of Civil Litigation Costs: Final Report* (The Stationery Office 2010)

are capped and only recoverable from the client[29]. The continuous updating of Butterworths Costs Service provides a large body of work amounting to a commentary on the law and practice of CFAs and ATE from 2000 to the present day[30].

Risk Assessment in Litigation 2001[31]

It had become clear during 1998/9 in working with solicitors and insurers in the field of CFAs at that time (i.e. just prior to the major change in government policy) that an understanding of the new law relating to litigation funding was essential as part and parcel of risk assessment[32]. It proved over the subsequent five or so years to be a correct view given the ultimate sanction for failure to understand the law was that the solicitor or barrister would recover no fees at all[33] if the rules were not followed - hence the 'costs

[29] The reversal of government policy in respect of recoverability of success fees and insurance premiums was effected by Part 2 of the Legal Aid and Sentencing and Punishment of Offenders Act 2012 which came into force on 1 April 2013. Section 44 removes recoverability of success fees; Section 46 removes recoverability of insurance premiums.

[30] Now in excess of 84,000 words this practitioner work covers the entire period from the Access to Justice Act 1999 to date. The edition of the work submitted with this thesis was up to date to December 2012.

[31] David J Chalk, *Risk Assessment in Litigation* (Butterworths 2001). Publisher's statement: 'This work will ensure that practitioners and insurers have all the information and guidance they need to assess the risk of a case in a practical and effective way and learn to develop strategies to identify and manage risk in litigation. It covers the law and principles of conditional fee agreements as well as considering the insurance and funding aspects.'

[32] At the time of the proposal for this book (2000) there had been three published books that addressed CFAs: CFAs – A survival guide – Michael Napier and Fiona Bawdon – Law Society (1995); K Underwood, No Win, No Fee, No Worries (1997); D O'Mahony, Conditional Fee Agreements Law and Practice 1999. An anonymous referee of the book proposal made the following comments: 'Napier and Bawdon: At present the publication is somewhat thin and could not be regarded as comprehensive. O'Mahony: is out of date…does not cover 'risk assessment' in any depth…they will not wish to bring out a second edition yet.' Those publications published before 2000 concerned CFAs and risk assessment was referred to but was not the focus of them and neither was there any research background to them in this respect and there was no published work that approached litigation risk in terms of a risk assessment process.

[33] S 58(1) Courts and Legal Services Act 1990 (as substituted by s27 Access to Justice Act 1999) provided that a CFA that failed to comply with the CFA Regulations was unenforceable. An application of the indemnity principle means that where a CFA is unenforceable there is no costs liability and therefore the losing litigant has no liability to indemnify the winning party for its costs.

war[34]' that commenced in 2000 and was only halted in 2005 by the abolition of the regulations[35].

The RAIL project had provided considerable material on which to base risk assessment methods suitable for CFAs. The RAIL project findings are written up in the book and provide originality in terms of the application of risk assessment in the context of fee agreements between lawyer and client that involve the lawyer in financial risk. It was then necessary to undertake doctrinal[36] legal research into the law as it existed prior to 2000 given it was not only the essential context of the new law but also because much of the existing law would continue to be applicable. The book also sets out the legislative provisions, subordinate legislation, Civil Procedure Rules and Practice Directions that implemented the changes from 1 April 2000 along with the Law Society Rules of Professional Conduct and the Bar Council Code of Conduct. The non-empirical research necessary to produce this synthesis thus extended far beyond pure doctrinal legal research[37].

The significance of the change being introduced in April 2000 is shown by the fact that the foreword to the book was provided by the then minister responsible for implementing the change, David Lock MP, the then Parliamentary Secretary to the Lord Chancellor's Department. The following extracts from the foreword are illustrative of the nature of the research:

> *With Conditional Fee Agreements the payment of legal costs depends on the success lawyers can achieve in the case for the client. That is a major sea change for the legal profession and presents new and significant challenges.*

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[34] Michael Cook, 'Costs Review-That was the Costs Year that was.' (2007) 26 CJQ 134. See further Rupert M. Jackson, *Review of Civil Litigation Costs: Preliminary Report* (The Stationery Office 2009) Ch 3: The costs rules and the Costs War.

[35] Conditional Fee Agreements (Revocation) Regulations 2005 (SI 2005 No 2305) Reg. 2 revoked the Conditional Fee Agreements Regulations 2000, the Collective Conditional Fee Agreements Regulations 2000, the Conditional Fee Agreements (Miscellaneous Amendments) Regulations 2003, and the Conditional Fee Agreements (Miscellaneous Amendments) (No 2) Regulations 2003.

[36] See Chapter 4, What is legal research?

[37] Fiona Cownie *Legal Academics* (Hart Publishing, 2004) 58 discussed fully in Chapter 4 What is Legal Research?

To work successfully in a world where cases are financed under CFAs lawyers need a new approach, new skills and to provide a higher level of service to the client. These massive challenges are in addition to the need to get to grips with the common law and the rules under which Conditional Fee Agreements must operate.

David Chalk's book is a welcome addition to the legal library because it addresses the complex web of legal relationships under CFAs in a comprehensive and authoritative manner, and gives a guide to the duties owed to all the parties in the relationships created by the different methods of financing litigation.

Risk Assessment in Litigation – Supplement 2002[38]

The changes brought about by the Access to Justice Act 1999 included the introduction of the recoverability of both the lawyer's success fee and the client's ATE insurance premium. This was seen as placing a considerable burden on insurance companies and their hostility was very quickly evident. Three fundamental aspects of the new funding regime were challenged by use of test cases to the Court of Appeal. The first, *Callery v Gray*[39], concerned two issues: the reasonableness of the success fee that a paying party was liable to indemnify and the whole matter of the recoverability of after the event insurance premiums. The second test case, *Sarawr v Alam*[40], saw a further challenge to the new funding regime based upon the availability of existing legal expenses insurance cover, it being argued that after the event premiums should be irrecoverable where before the event insurance was available. The combined effect of these test cases was intended to significantly reduce the cost to insurers of the new policy of recoverability. These test cases were heard in the Court of Appeal within months of the publication of Risk Assessment in Litigation and the Supplement was considered an essential update. The Supplement sought to extract guidance and general principles from the judgments of the Court of Appeal and provide practical approaches for practitioners who would need to ensure that their funding

[38] David J Chalk *Risk Assessment in Litigation Supplement* (Butterworths 2002)
[39] *Callery v Gray* [2001] EWCA Civ 1117; Callery v Gray (No 2) [2001] EWCA Civ 1246.
[40] *Sarwar v Alam* [2001] EWCA Civ 1401

arrangements took account of these decisions. The Supplement therefore uses a combination of doctrinal legal analysis and contextual non-legal materials, especially the Law Society Rules of Professional Practice and insurance policy wordings[41].

Butterworths Costs Service – Division E Litigation Funding[42]

Butterworths Costs Service contains a complete statement and explanation of the law relating to contentious costs of civil proceedings with Division E Litigation Funding providing a comprehensive treatment of conditional fee agreements, after the event insurance, membership organisation funding and the risk assessment materials from David J Chalk, *Risk Assessment in Litigation*[43]. This is a major practitioner work in loose-leaf format consisting of two volumes. Division E has in effect enabled much of the title *Risk Assessment in Litigation* to be kept up to date since 2001 and therefore provides an unbroken commentary on the development of the law in the field of litigation funding. As with *Risk Assessment in Litigation* Division E consists of doctrinal research in the broad sense of including not only traditional legal materials such as statue and case law but further non-standard materials drawn from the professional bodies and from insurance practice so that the context of the law is fully considered. The case law which built up from 2001 dealing with litigation funding and especially with the recoverability of success fees and after the event insurance premiums is considerable both in volume and complexity and an analysis of it requires careful consideration of contextual materials and especially of changing government policy.

[41] Doctrinal analysis of *Sarwar v Alam* for example would alone not provide guidance for the application of the law to future funding decisions to be made by solicitors. Contextualising the decision with standard insurance policy wordings was intended to show the working of the law in practice.
[42] His Honour Michael Cook (Ed) Butterworths Costs Service (Butterworths 2012)
[43] David J Chalk, *Risk Assessment in Litigation* (Butterworths 2001)

The Articles

The journal articles indicate the on-going nature of the works in the public domain and the continued relevance of the original research project[44] conducted in 1999. David Chalk, 'Sounding the retreat' (2002) S.J., 146(35), 831-832 dealt with *Halloran v Delaney* [2002] EWCA Civ 1258; [2003] 1 W.L.R. 28 (CA) the first of several Court of Appeal decisions that were subsequent to the landmark case of *Callery v Gray* [2001] EWCA Civ 1117 and which were arguably contradictory to it. The article firstly provided a critical analysis of the decision in *Halloran* that success fee in CFAs entered into after 1 August 2002, where a claim settles without proceedings, was to be five per cent, secondly compared the decision in *Callery* and thirdly raised concerns at continuing uncertainty as to costs recovery.

The attempt by government to lessen the so called 'costs war' that had sprung up since 2000 was the focus of the article David Chalk, 'As simple as CFA' (2003) S.J. 2003, 147(21), 614-615 which explained the introduction of simplified conditional fee agreements (CFAs) and collective conditional fee agreements (CCFAs). New regulations[45] permitted a client's liability for own costs to be limited to sums recovered from the opposing party, removing the indemnity principle for this purpose. The article set out the changes to the Conditional Fee Agreements Regulations 2000 and focussed on the information that must be given to a client under a simplified CFA and the issues arising in relation to consumer protection and the operation of Part 36 offers. The article went on to highlight more uncertainties following the amendment of the Collective Conditional Fee Agreements Regulations 2000.

In David Chalk, 'CFAs after 1 November - a brave new world?' (2005) 155 NLJ 174 another Court of Appeal decision, *Garbutt v Edwards* [2005] EWCA Civ 1206; [2006] 1 W.L.R. 2907 (CA (Civ Div), again relating to success fees was considered and the article showed a development in judicial attitude alongside a recent government announcement of the revocation of the Conditional Fee Agreements Regulations. The article also reviewed

[44] See Chapter 1 RAIL

[45] The Conditional Fee Agreements (Miscellaneous Amendments) Regulations 2003, SI 2003 No. 1240

Campbell v Mirror Group Newspapers Ltd (Costs) [2005] UKHL 61; [2005] 1 W.L.R. 3394 (HL) where the House of Lords considered the public policy underlying the rules relating to litigation funding.

David Chalk, Costs: 'Part 36 offers and late acceptance' C.J.Q. 2011, 30(2), 133-135 discusses the issue of late acceptance of CPR Part 36 offers following the removal in 2007 of the need for court permission for late acceptance and considers the arguments put forward in *Sampla v Rushmoor BC* [2008] EWHC 2616 (TCC) (QBD (TCC), where a defendant sought to accept a Part 36 offer during the trial, that the offer had been rejected, that offers could not be accepted once trial had begun and that acceptance was prevented by estoppel by convention. The article went on to consider two further recent cases concerned with Part 36, *Gibbon v Manchester City Council* [2010] EWCA Civ 726; [2010] 1 W.L.R. 2081 (CA (Civ Div)) and *C v D* [2010] EWHC 2940 (Ch); [2011] 1 W.L.R. 331 (Ch D) dealing respectively with offers on costs and time limited offers which do not comply with Part 36. The operation of Part 36 of the Civil Procedure Rules is fraught with difficulty and has become a quagmire of technicalities producing further risks for litigation, hence the significance of these cases and their relevance to the thesis.

David Chalk, Part 36: 'a game of trumps' (2011) L.F., 76 (Dec), 20-21 continued the Part 36 theme and discussed the change made to the CPR r.36.14 by the addition of sub-r.(1A) on the meaning of "more advantageous". Consideration is given to the consequences caused by the fact that the change is not retrospective. The article provides comments on the Jackson[46] recommendations on the penalties faced by the defendant or claimant who refuses the other party's reasonable Part 36 offer and outlines the thoughts of a Civil Justice Council's experts' workshop on the issue of how Part 36 sanctions can work alongside qualified one-way costs shifting[47]. This article whilst considering the law as it was in 2011 was also therefore raising questions as to the implementation of the Jackson Reforms that were expected to (and did) come into force in 2013.

[46] Rupert M. Jackson, *Review of Civil Litigation Costs: Final Report* (The Stationery Office 2010)

[47] Qualified one-way costs shifting (QOCS) was a recommendation made in the Jackson Report which shifts what would otherwise be a costs risk carried by claimants in personal injury cases that fail.

The 2013 article[48] brings the published works to a significant point in the development of the law and practice of litigation funding and considers the treatment by the Court of Appeal in *Sibthorpe v Southwark LBC* [2011] EWCA Civ 25 of the legality and desirability of a solicitor who is acting for a client in litigation, and therefore owes a duty not only to the client but to the court, of taking a financial risk in the litigation by underwriting the client's potential liability for the costs of the opponent in the event that the claim fails. The turning point here is the Jackson Report and the government of the day's decision to implement a wholesale reform of the funding of civil litigation. The new policy aims to reduce costs and in particular has removed the liability of losing parties for the success fees and insurance premiums of winning claimants. It is submitted that the decision of the Court of Appeal in *Sibthorpe* that it is lawful for a solicitor to underwrite a client's costs liability would not have been made prior to the Jackson Report. The decision very much accords with government policy but it does so by permitting what would previously have been seen as an unacceptable conflict of interest[49]. It is also of academic interest that the judgment of Lord Neuberger MR seeks to breathe new life into a 1998 decision of the Court of Appeal (*Thai Trading Co (a firm) v Taylor* [1998] QB 781) which had at that time taken a liberal view of the funding arrangements permitted between solicitor and client. That decision was later held to be per incuriam[50] notwithstanding that the Courts and Legal Services Act 1990 had permitted conditional fee agreements. Lord Neuberger's attempt to rehabilitate *Thai Trading* is indicative of the new tolerance of conflicts of interest where they can be seen as the inevitable risk involved in measures that are expected to save costs. The article thus considers the case law background to the decision in *Sibthorpe* and widens the analysis to encompass the lack of definition in English law of a contract of insurance. Of

[48] David Chalk, Solicitor client costs indemnities: unregulated insurance or benign assistance? (2013) J.B.L, 1, 59-76

[49] Government policy in implementing the Jackson Report and the judicial encouragement of the then Master of the Rolls in Sibthorpe to solicitors taking a financial risk in circumstances of clear conflict of interest sits in stark contrast to the evident absence of ethical considerations at all stages of legal training, including CPD, highlighted by Andrew Boon 'Professionalism under the Legal Services Act 2007 (2010) International Journal of the Legal Profession, 17.3, 195-232

[50] *Awwad v Geraghty & Co* [1999] EWCA Civ 3036

particular interest is the decision in *Re Digital Satellite Warranty Cover Ltd*[51] which showed a markedly more aggressive stance towards a business model in the field of satellite television equipment where the categorisation of the product offered as a contract of insurance was a route to regulation of the business. That is a legal context in which the *Sibthorpe* policy driven decision sits, and, it is submitted, sits uneasily.

[51] *Digital Satellite Warranty Cover Ltd, Re* [2011] EWCA Civ 1413. Later approved in *Digital Satellite Warranty Cover Ltd & Anor v Financial Services Authority* [2013] UKSC 7

Chapter 3

Quantitative answers to qualitative questions – the tale of a success fee

The introduction in 1995 of "no win no fee"[52] arrangements made by lawyers who represent clients in litigation led to the need to assess risk in litigation. From April 2000 a losing party had to pay the winning party's success fee[53] where that party has been represented by a lawyer under such arrangements. Paying parties therefore sought to challenge the level at which a success fee was set. Methods of risk assessment could therefore be used not only to assess the risk that a lawyer was taking on, and to inform the decision whether to do so, but also to justify the level of success fee that would ultimately be sought from a losing opponent. It was this latter function of risk assessment that came to be analysed in *Motto & Ors v Trafigura Ltd & Anor*[54](hereafter *Trafigura*) . This is a decision of the Court of Appeal and concerned a class action in which 30,000 claimants were represented on a no win no fee basis. The Court had to consider the success fee claimed by the lawyers and which the losing defendants challenged. The method used by the claimant lawyers to arrive at their 100% success fee was based on the use of probability theory. This chapter considers why the use of probability theory was misguided (as the court found) in this particular context and how academics have questioned its use more generally. *Risk Assessment in Litigation*[55] was cited in the judgment of Lord Neuberger MR[56] and the author advised the respondent.

The concept of a "success fee" was introduced into English law by the Courts and Legal Services Act 1990. By s58 of the Act it became possible for a lawyer to provide advocacy and litigation services on a conditional fee basis, that is to say that the lawyer could now

[52] Formally a Conditional Fee Agreement where no fees are payable unless a 'win', as defined in the CFA, is achieved.
[53] Section 27 Access to Justice Act 1999 inserted s58A(6) into the Courts and Legal Services Act 1990 and provided for a success fee to be recoverable in costs.
[54] [2011] EWCA Civ 1150
[55] David J Chalk, *Risk Assessment in Litigation* (Butterworths 2001)
[56] *Motto & Ors v Trafigura Ltd & Anor* [2011] EWCA Civ 1150 at [123]. This passage from Lord Neuberger MR's judgment was later cited in the judgment in Walker v Burton [2013] EWHC 811 (Ch) where again a success fee had been challenged.

agree to forgo payment of fees if the case failed. To compensate for that risk the lawyer was permitted to charge a premium in the form of a success fee in those cases which won. A statutory maximum success fee of 100% uplift on the costs incurred was imposed. The basis of the calculation of the success fee was an arithmetical reciprocal[57] of the costs actually incurred. Such calculation required first a figure to be produced as to the probability that the case would succeed. The reciprocal of that probability when applied as a multiplier to costs in successful cases would exactly compensate for similar cases which lost. A simple illustration can be taken from the 100% maximum figure. That represents a reciprocal of 50% probability of success. Assuming that probability to be accurate, one such case out of two will win and the other will lose. To compensate the lawyer's loss of fees in one case the other must provide double fees.

Thus was born the notion that success fees were capable of being set on a mathematical basis, and that what is in all respects a qualitative question, "what are the prospects of this individual case succeeding?" can be given a quantitative answer[58]. The method relies entirely on the first step of expressing confidence in terms of a percentage figure. The

[57] The Law Society published Michael Napier and Fiona Bawdon *Conditional Fees - A Survival Guide* in 1995 (the year in which CFAs became lawful) in which a table of the reciprocal values of percentage figures representing prospects of success was set out. The table was known as the 'ready reckoner' and appeared as Appendix 2– p 184.

[58] A question posed by Andrew Miller MP as chair of the House of Commons Science and Technology Committee to Prof David Spiegelhalter "Can any risk be measured by purely quantitative methods, or will it always be subject to qualitative assessments?" is answered with great illumination on the matter as follows: "There is always a quantitative and qualitative aspect. Any number that is put on anything is always dependent on some assumptions that you make. You narrow down your focus to an average case or particular class of individual." Prof Spiegelhalter then went further: "There is always a qualitative element to do with the quality of the evidence available and the robustness of the number you put on it. As a statistician, I am keen that we try to put numbers and magnitudes on things. However, we have to be aware of the limitations in how far we can go, the sorts of qualifications we have to add to those numbers and acknowledge the fact that we cannot put numbers on everything." (Oral Evidence Taken before the Science and Technology Committee on Wednesday 18 January 2012 – available at http://www.parliament.uk/documents/commons-committees/science-technology/ST-120118-Risk-HC-1742-i.pdf). Note: neither witnesses nor Members have had the opportunity to correct the record. The transcript is not yet an approved formal record of these proceedings.

implications of that first step are explored in detail in *Risk Assessment in Litigation*[59] where the following point is made which came to form the basis of the contest between the parties in *Trafigura*:

> Using a mathematical basis for risk assessment is popular but it carries with it the danger that by allotting a number and then adding to and subtracting from it, an appearance of precision or objectivity is given to what is in reality a subjective process.[60]

The claimed success fee in *Trafigura* was 100% and with the base costs to which that figure would be applied running to over £50m a great deal of money was at stake and it was inevitable that a challenge would be made to the level of the success fee. The first stage in litigating this dispute took the form of a hearing by the Senior Costs Judge of twenty-two preliminary issues of which the thirteenth was the success fee. The Senior Costs Judge allowed a success fee of 58% which represents a 63% chance of winning.

The claimant submitted to the court a risk assessment form which provided the following figures:

"(a) limitation 100%;

(b) breach of duty 80%;

(c) contributory negligence 100%;

(d) causation – medical 90%;

(e) causation – other 85%;

(f) failing to beat P36 %

(g) enforcement %

(h) other ? %

(i) forum 82.5%

[59] David J Chalk, *Risk Assessment in Litigation* (Butterworths 2001) Ch 22 Risk and Success Fees; Ch. 23 Probability; Ch. 24 Decision Trees.
[60] David J Chalk, *Risk Assessment in Litigation* (Butterworths 2001) 22.5

(j) %

Total ((a) x (b) x (c) x (d) ….) = 50% = chance of winning."

It was explained to the court that a 100% risk factor meant a 0% chance of losing, so for breach of duty the risk of losing was 20%, medical causation 10%, other causation 15% and forum 17.5%. By multiplying the risk figures a 50% chance of winning is produced which then correlates to a success fee figure of 100%.

At the preliminary issues hearing counsel for Trafigura argued that that the correct approach would be to take the 20%, 10% and 15% risks, add the three up, and divide by three, to get what he called the "mean" risk. The Senior Costs Judge rejected that argument saying "That cannot, in my view, be right and appears to ignore probability theory."[61]

The reference to 'probability theory' is of enormous significance and it is a reference to the so called multiplication rule, that where there are multiple independent risk factors their individual probabilities must be multiplied to give an overall risk probability. A simple example often relied upon to illustrate the rule is the coin tossing exercise where if one coin is tossed there is a 50:50 probability of the coin landing as heads but if four coins are to be tossed then to calculate the probability of each coin falling as a head the probability of each individually landing heads (50%) is multiplied by all other probabilities– hence 50% x 50% x 50% x 50% = 6.25%. Where four coins are to be tossed there are 16 possible outcomes in terms of heads and tails and the result all heads is only one of those sixteen, i.e. 1/16th or 6.25%.

An illustration[62] in the context of litigation using just three factors shows the theoretical result of the application of the multiplication probability theory:

- Limitation (L)

[61] *Motto & Ors v Trafigura Ltd & Anor* [2011] EWHC 90201 (Costs) unreported: Case No: HQ06X03370 SCCO Ref: PTH 1002160 & 1002161 at [433]

[62] This example was provided by an anonymous contributor from the University of Surrey to a discussion about the application of probability theory in which I engaged with colleagues at the University of Winchester and the University of Surrey.

- Duty (D)
- Causation (C)

The case will only be won by winning on L,D and C.

The probability of winning on L is p(L) = 0.9; similarly p(D) = 0.88 and p(C) = 0.6.

There are eight possible outcomes; the probabilities of each individual outcome are found by multiplying them together.

Let nL = losing on limitation, nD = losing on duty and nC = losing on causation.

Thus p(nL) = 0.1 p(nD) = 0.2 and p(nC) = 0.4

LDC	0.432
LD nC	0.288
L nD C	0.108
L nD nC	0.072
nL D C	0.048
nL D nC	0.050
nL nD C	0.012
nL nD nC	0.008

A striking observation here is that by showing all of the probabilities it becomes clear that the winning combination of LDC is in fact the most probable of the eight possible outcomes but of course the combined probabilities of the unsuccessful outcomes reduces the chance of winning to below 50:50.

The use of probability theory can be attacked on the following grounds:

- No data is available – the figures are not probabilities (frequencies), unlike in coin tossing.
- The number of factors identified will always reduce the prospects of success
- The results produced by the method are extreme and defy reality
- Success fees are intended to compensate for the risk of losing – a case can only be lost once
- The effect of the decision of the Senior Costs Judge on this case and future cases would be to grossly inflate the success fee

The decision of the Senior Costs Judge accepts the application of the multiplication theory by which the probabilities of each independent event in a series of events is multiplied against each other element to provide an overall probability that all the events will occur. The judge has thus applied a probability theory in arriving at his starting point in the assessment of the success fee. It is submitted that the use of such a method is fundamentally flawed.

The difficulties in using probability in litigation is a subject on which there is considerable literature[63] and there are notorious cases such as *R v Sally Clark*[64] and *R v Denis John Adams*[65] which should lead to the utmost caution in adopting mathematical models in making decisions in individual real world cases.

The number of risk factors identified in the litigation has a dramatic effect on the use of the multiplication method. The premise upon which the 50% figure is arrived at in *Trafigura* is misconceived. The Claimant solicitor's risk assessment method multiplies the various factors said to constitute the risk. It follows that for each element of risk added to the risk assessment the risk of failure increases (save for any factor where there is no risk, such factor being represented in the risk assessment as having a 100% chance of success). It follows also that the final risk figure will depend upon the number of risk factors included. The greater the number of risk factors the lower the chances of success.

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[63] Two facets of the legal system are frequently addressed in this literature and they are firstly the concept of the standard of proof and secondly the presentation and admission of statistical evidence: see for example Joseph Kadane, *Statistics in the law* (Oxford University Press 2008) on the first point; Richard Eggleston *Evidence Proof and Probability* (Butterworths 1983), Stephen E. Fienberg, Samuel H. Krislov, and Miron L. Straf, 'Understanding and Evaluating Statistical Evidence in Litigation' 1995 Jurimetrics Vol. 36, No. 1 (Fall 1995) 1 and Bart Verheij, Henry Prakken and Hendrik Kaptein, *Legal evidence and proof: statistics, stories, logic* (Ashgate 2008) on the second point.
Neither issue is of direct assistance in terms of risk assessment. L Jonathan Cohen, *The Probable and the Provable* (Oxford University Press 1977) concentrates on a third issue which is much nearer the questions that arise in assessing the risk in litigation, and that is how judges arrive at decisions. Cohen's work is considered further below.

[64] [2003] EWCA Crim 1020 – murder conviction influenced by statistical evidence quashed by Court of Appeal

[65] [1997] EWCA Crim 2474 - rape conviction based on DNA probability evidence quashed by Court of Appeal.

The effect is well illustrated in *Trafigura* because there are no risk factors where the prospects of success fell below 80% and yet the result of the misconceived multiplication is that the case becomes a 50% risk. Were sufficient factors to be included in such a method and each factor to have a 95% prospect of success the result of multiplying each risk factor will again produce a 50% risk. In the case of 95% prospects of success, twelve risk factors would produce a 51% chance. Indeed in theory that would happen where all factors had a 99% chance of success – given sufficient of them[66] the effect of multiplication will be a 50% chance. The flawed nature of this method can be further illustrated by including just one risk factor assessed at 50% which will inevitably bring an overall prospect of success to well below 50% where there is one or more additional risk factor. If any one of the risk factors used by the solicitors had actually been assessed at 50% the overall figure after the flawed multiplication is applied would be in the region of 22% chance of success.

In addition to the above absurdities in the use of the multiplication method there is the problem that the starting point in the risk assessment is not data that produces mathematical probabilities. There are no mathematical probabilities and no data. The percentage figures produced in the risk assessment are in fact expressions of confidence and no more than that. Confidence is being expressed by the convenient use of a figure but it does not result in that figure becoming a mathematical probability based upon data[67]. To then apply a statistical method to figures that are not statistically derived is fundamentally wrong. To then ask a court to base a real decision as to the correct level of a success fee based only upon that method is also fundamentally wrong and represents a culmination of a series of misapplications of a mathematical theory.

It is also the case that litigation cannot be replicated unlike the tossing of coins. It is not possible to produce statistical probabilities – there are no frequencies that can be

[66] For examples of multiple risk factors in litigation see David Chalk, *Risk Assessment in Litigation* (Butterworths 2001) Chapters 25 to 28 inclusive.
[67] For a description of the use of numbers to express subjective belief see Terrance Anderson, David Schum and William Twining, *Analysis of Evidence,* (2nd Ed 2005 Cambridge University Press) 230. See also David J Chalk, *Risk Assessment in Litigation* (Butterworths 2001) at paragraph 22.5.

calculated. It might be possible using very crude descriptors such as 'professional negligence' or 'personal injury' to obtain some data showing success rates in cases of that type but that is far from the method used in the instant case.

The absurd results show that it is not appropriate to adopt a probability theory that requires risk factors to be multiplied together. *Risk Assessment in Litigation*[68] makes reference especially to L Jonathan Cohen, *The Probable and the Provable*[69] and Sir Richard Eggleston, *Evidence, Proof and Probability*[70]. Cohen's argument is that mathematical[71] probability does not produce results borne out by the outcomes of court decisions. He then argues for what he terms 'inductive probability'[72] which is not based on frequencies.

There is also a misconception as to the function of the success fee. The case being run under a CFA can only be lost once. It matters not how many risk factors can be discovered to make up the case as a whole. A success fee in the simplified example given above which took the single lowest prospect of success (60%) will compensate for the risk of losing the case whatever the reason it is lost, be that because it lost on limitation (the lowest risk) or causation (the highest risk). To multiply the three or however many risk figures together and then turn that result into a success fee is to provide compensation many times over.

If the Claimant's method were to be adopted a very high percentage of cases that are litigated under a CFA would be likely to lose and the success fees in all but very certain cases would be 100%. A large number of cases would be unviable. This flies in the face of the reality of litigation and is in itself sufficient to show that the method is entirely inappropriate in making a real decision about a success fee.

If the decision of the Costs Judge had been followed in the Court of Appeal the prospect of a success fee below 100% as a starting point would have disappeared. It would also be

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[68] David J Chalk, (2001) *Risk Assessment in Litigation* (Butterworths 2001)
[69] L Jonathan Cohen, *The Probable and the Provable* (Oxford University Press 1977) (Reprinted Gregg Revivals 1991). Cohen is more recently referred to in Hendrick Kaptein, Henry Prakken and Bart Verheij *Legal Evidence and Proof* (Ashgate 2008).
[70] Sir Richard Eggleston, *Evidence, Proof and Probability* (Butterworths 1983)
[71] Cohen refers to this as Pascalian probability.
[72] Cohen *The Probable and the Provable* (Oxford University Press 1977) 40.

possible to show that the correct statistical success fee in many cases that have won would be far in excess of the limited 100% success fee permitted by law.

The Court of Appeal in *Trafigura* was faced with each side arguing that the Senior Costs Judge had been wrong on the success fee point. The Court took a very different view from that of the Senior Costs Judge on how the calculation of the success fee should be conducted and having heard argument from Nicholas Bacon QC for Trafigura as to the use of the multiplication method Lord Neuberger MR dealt with the point as follows:

> Of course, in order to arrive at an appropriate success fee, it is necessary to attribute quantitative risk assessments to the potential problems, and, at any rate at first sight, it appears sound logic in principle to multiply out those risk assessments in order to arrive at the overall risk. However, in the context of legal proceedings, such an approach is open to attack in principle, as may be appreciated from the rather compressed discussion in paras 23.5-9 in *Chalk on Risk Assessment in Litigation* (2001). Not only is the precision[73] accorded to the prospects somewhat artificial, but the implicit assumption that each of the risks is entirely self-contained, or insulated from all the other risks, is plainly very questionable. Further, as Mance LJ recognised in *Hanif v Middleweeks* (unreported, 19 July 2000), para 41, a judge trying a case "might, even if only subconsciously, [be] predisposed towards a more favourable overall conclusion on the technical issues if and when he had concluded that the hurdle involved on the [substantive causation issue] could be overcome [by the claimant]"[74].

The Court, having rejected the multiplication method adopted by the Claimant and accepted by the Senior Costs Judge, proceeded to arrive at a success fee of exactly the percentage figure (58%) that the Senior Costs Judge had arrived at. Having started from a very different point to that taken by the Senior Costs Judge there is room or some scepticism as to the result reached by the Court of Appeal. What is of considerable importance, however, is the rejection of the multiplication rule. The Court did not however

[73] The risk assessment sheet used the figures 80%; 82.5%, 85%; 90%.
[74] [2011] EWCA Civ 1150 at [123]

grasp the nettle firmly. The reference to the decision in *Hanif v Middleweeks* appears to be an attempt to categorise the risks in litigation as not independent of each other. In so doing it is then inevitable that the multiplication method is inappropriate.

The argument in *Risk Assessment in Litigation* is that even if the factors in litigation are independent it is not correct to apply the multiplication method. That argument is not new and reference is made in *Risk Assessment in Litigation* to L Jonathan Cohen *The Probable and the Provable*[75] where it is argued that quantitative measures of probability cannot be assigned to litigation and the results of the multiplication method simply are not seen in the decisions of the courts.[76]. Cohen's arguments are given a very full account in Richard Eggleston *Evidence Proof and Probability*[77] where that author sums up Cohen's argument as being that where there are multiple factors involved the case is no weaker than the weakest of the elements[78]. Scolnicov[79] accepts Cohen's inductive probability theory[80] and observes that the adversarial system is based upon 'theory-choice' meaning that the court is required to choose between competing theories as to the events in question. Risk assessment in litigation is therefore an attempt to predict the likelihood of persuading a judge of the theory the litigator is putting forward or the likelihood of persuading the opponent that the judge will accept the theory.

The Court of Appeal in *Trafigura* does not adopt Cohen's thesis but neither is it rejected. The reliance on *Hanif* as a means of escaping the multiplication method whilst understandable, as it removed the need to address Cohen's arguments, is open to criticism on the basis that it misreads the decision in *Hanif*. In *Hanif* there were three issues that a

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[75] Oxford University Press 1977 – Reprinted (Gregg Revivals 1991).

[76] Cohen devotes six chapters to his thesis which collectively form Part II Six Difficulties for a Pascalian account of Judicial Probability – pp 49-120.

[77] Richard Eggleston *Evidence Proof and Probability* (Butterworths 1983) Ch 3. Probability as a Basis for Decision-Making.

[78] Ibid 37. Cohen's conclusion that the risk in the case is no greater than the weakest risk factor if applied to the solicitor's risk assessment in *Trafigura* would find the weakest factor was breach put at 80%. The starting point would therefore have been the 80% chance of success which produces a success fee of 25%.

[79] Anat Scolnicov, 'On the Relevance of Relevance to the Theory of Legal Factfinding' (2000) 34 Isr. L. Rev. 260

[80] The author then argues in the alternative that mathematical probability based upon new formulae can produce the same result and reflect the realities of litigation.

trial judge[81] would have needed to decide in favour of the claimant but each of them depended upon the credibility of the claimant as a witness, hence Lord Neuberger's phrase that the risks were not insulated from each other. On that basis the judge declined to simply multiply together the separate probabilities of success that he had already arrived at. The Court of Appeal in *Hanif* approved of that decision but at the same time reduced the final figure representing overall prospects. It did so without using any mathematical reasoning, preferring simply to assert that some reduction had to be made to reflect the fact that the claim would only succeed if all three issues were decided in the claimant's favour. The trial judge seems to have taken the view that one of the three factors, an allegation that the claim was fraudulent, was so dominant that the other two factors were not significant in terms of prospects of success. The case would stand or fall on the issue of fraud. Whilst that issue was assessed as by far the weakest the trial judge does not, at least not explicitly, adopt Cohen's view that the case was therefore no weaker than that issue, although the result was the same. The Court of Appeal in *Trafigura* does seek to take that somewhat fact sensitive decision and regard it as of more general application as representing a view that a judge finding on one issue in favour of a party is more likely to find in that party's favour on other issues and that multiple issues in litigation are not insulated from each other. The issues in *Trafigura* do not share common factors such as the credibility of the claimant in *Hanif* and nowhere does the Court explain why the factors in *Trafigura* are not insulated from each other. Whilst therefore the decision in *Trafigura* does not directly adopt Cohen's argument it is yet another example supporting Cohen's point that the decisions reached by the courts do not reflect the results that would be reached by an application of probability theory[82].

[81] This was a negligence claim against solicitors for the loss of the chance of taking a claim to court. Loss of chance claims are assessed on the basis of prospects of success had the claim reached trial. Provided prospects on any issue are more than insignificant they do not need to reach 50% in order for damages to be awarded for the loss of chance. In *Hanif* the overall prospects were originally assessed at 25% which was reduced to 20% by the Court of Appeal. This is therefore a very different context in which the use of probabilities as a measure of prospects was being considered.

[82] The result of multiplying the factors in *Hanif* would have been to reduce the overall prospects of success to 12% whereas the Court of Appeal put them at 20%.

Chapter 4

What is *legal* research?

Introduction

In many academic disciplines an equivalent question 'what is … research?' would be absurd in 2013. In Law, however, it is far from absurd even now and deserves exploration. The published work forming this PhD thesis provides an opportunity to consider the question of what is legal research as a retrospective question and to reflect upon the research journey that began in 1999 and taking a convenient cut off point of 2013. That is not to say that the research is concluded, if ever that can be claimed, it certainly is not claimed for the field of civil litigation which continues to shift ground and which from 1 April 2013[83] has undergone a momentous shift in government policy.

Evidence that the question of what is legal research can still be asked in 2013 is amply available and there appears to have been a recent reinvigoration[84] of this enquiry both in

[83] It was a change in government policy in 1999 which led to the original RAIL research being conducted. In 2013 government policy implementing the Jackson Report (Rupert M. Jackson, *Review of Civil Litigation Costs: Final Report*. The Stationery Office 2010) reversed the 1999 position. Risk in litigation has not as a result been reduced but it has been "rearranged" with, it is submitted, an unprecedented shift of risk to claimants and to their lawyers. The cut off date for this thesis is therefore 2013 given the scope of this change in policy.

[84] Rob van Gestel, 'Research Methodologies in EU and International Law–By Robert Cryer, Tamara Hervey and Bal Sokhi-Bulley, with Alexandra Bohm' European Law Journal 18.1 (2012): 164-166 commenting that the book being reviewed was part of a "relatively new and rapidly growing body of literature on the role of methodology in legal research." van Gestel then cites two further examples of recent publications - Ulla Neergaard, Ruth Nielsen, Lynn Roseberry (eds) *European Legal Method* (Copenhagen: DJØF legal publishing 2011) and Mark van Hoecke (ed.) *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing 2011). Most recent is Dawn Watkins and Mandy Burton Eds. *Research Methods in Law* (Routledge 2013) which gathers together the work of a number of researchers whose views, the editors observe, are not always compatible.

England[85] and in particular in Europe[86]. It is significant at this point to consider that the fundamental differences between the English Common Law system and the European Continental civil law system have seemingly not led to differences in academic research in law. Something inherent in the subject of law then can be claimed to exist which has produced what is now widely recognised as doctrinal legal research as one approach found in the legal academy be that in England[87], Europe[88], India[89] or the USA[90]. That said, however, much has been written since 1999 about *externally* focussed legal research with doctrinal legal research being labelled as *internally* focused research. This nomenclature is sometimes used pejoratively to suggest that doctrinal legal research is somewhat inferior to externally focused research. Regardless of the relative merits and demerits that such a debate might assert, the reasoning behind the distinction is useful and provides a significant principle by which to reflect upon the published works and the research lying behind them.

The research behind the published works forming this thesis is a combination of external and internal methodologies. The word methodology is here used[91] to indicate a reasoned

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[85] See for example Mike McConville and Wing Hong Chui, *Research Methods for Law* (Edinburgh University Press 2007) and more recently Peter Cane, and Herbert Kritzer, eds. *The Oxford handbook of empirical legal research* (Oxford University Press 2010).

[86] Rob van Gestel and Hans-Wolfgang Micklitz, 'Why Methods Matter in European Legal Scholarship' (2013), European Law Journal doi: 10.1111/eulj.12049; Rob van Gestel, Hans-W. Micklitz and Miguel Poiares Maduro, *Methodology in the new legal world* (2012-13) EUI Working Papers LAW 2012/13 European University Institute Florence Department of Law http://hdl.handle.net/1814/22016; Rob van Gestel and Hans-Wo Micklitz, *Revitalizing doctrinal legal research in Europe: what about methodology?* EUI Working Papers LAW 2011/05 European University Institute, Florence Department of Law http://ssrn.com/abstract=1824237

[87] Terry Hutchinson and Nigel Duncan, 'Defining and describing what we do: Doctrinal legal research' (2012) *Deakin Law Review* 17.1

[88] Ashish Kumar Singhal and Ikramuddin Malik, 'Doctrinal and socio-legal methods of research: merits and demerits' (2012) Educational Research Journal 2.7 252-256.

[89] Jan Vranken, 'Exciting Times for Legal Scholarship' (2012) Law and Method 2: 42-62; Sanne Taekema, 'Relative Autonomy, A Characterisation of the Discipline of Law' (March 29, 2010). Available at SSRN: http://ssrn.com/abstract=1579992 or ttp://dx.doi.org/10.2139/ssrn.1579992

[90] Peter Schuck, 'Why Don't Law Professors Do More Empirical Research?' (1989) 39 J. Legal Educ. 323

[91] For differing views as to the use of the term 'methodology' see Martijn Hesselink, 'A European legal method? On European private law and scientific method' European Law

use of a method or combination of methods – the reasoning being the methodological question rather than the methods themselves. Doctrinal legal research as a methodology, i.e. as a reason for doing what is done, is considered first and the externally focussed methodology considered thereafter.

Doctrinal legal research

Many of the sources already referred to include some treatment of doctrinal legal research and at least in terms of what is meant by such research there appears to be a good degree of agreement[92]. Doctrinal legal research is bedded in what practitioners and judges do[93] – it is at the core at least of what is presented as the public face of the English legal system. For those engaging in researching legal practitioners and in publishing work aimed squarely at that audience the essence of doctrinal legal research strikes such a chord that it needs no further justification.[94]

Journal 15.1 (2009): 20-45. See also Dawn Watkins and Mandy Burton *Research Methods in Law* (Routledge 2013) 2.

[92] See in particular Mike McConville and Wing Hong Chui, *Research Methods for Law* (Edinburgh University Press 2007) 3, Anthony Bradney 'The Place of Empirical Legal Research in the Law School Curriculum' in Peter Cane, and Herbert Kritzer, eds. *The Oxford handbook of empirical legal research* (Oxford University Press 2010) Ch 42 and Terry Hutchinson and Nigel Duncan, 'Defining and describing what we do: Doctrinal legal research' (2012) *Deakin Law Review* 17.1. For Hutchinson's further treatment of doctrinal research see 'Doctrinal research: researching the jury' in Dawn Watkins and Mandy Burton *Research Methods in Law* (Routledge 2013) 7.

[93] Terry Hutchinson and Nigel Duncan, 'Defining and describing what we do: Doctrinal legal research' (2012) 17.1 Deakin Law Review 83: 'The doctrinal method is similar to that being used by the practitioner or the judge, except that the academic researcher (or HDR student) is not constrained by the imperative to find a concrete answer for a client.' 107

[94] Susan Bartie, 'The Lingering Core of legal scholarship' (2010) Legal Studies 30.3: 345-369 reaches the conclusion that scholars can 'demonstrate their relevance through traditional understandings' and that 'scholars who incorporate the core's tenets can turn to the traditional justifications for legal scholarship: that it is useful, it can shape law reform. Scholarship that critiques principles of law and offers up reform proposals is based on the implicit premise that law makers can readily access the work or the ideas within. The relevance of the scholarship and thereby the scholar is easily established. No further justification is required.' 367

So what is doctrinal legal research? In 1962 reference was made to doctrinal legal research in these terms:

> The essential characteristics of doctrinal research are: (1) the scholar organizes his study around legal propositions; and (2) appellate court reports and other conventional legal materials readily accessible in a law library are the principal, if not the sole, sources of the data from which the scholar's conclusions are drawn. The bulk of legal research is a product of this approach.[95]

By 1994 Twining[96] was able to devote an entire chapter of his Hamlyn Lectures to the question of legal scholarship and the roles of the jurist. In it he seeks to refute a negative view of legal scholarship as being 'not really academic',[97] to explore the breadth of activity that is undertaken by legal academics, consider the role of exposition as scholarship and to give some account of the 'socio-legal' movement. Twining's treatment of exposition, which is the nearest to what might be termed doctrinal research, makes the case that 'even the most mundane kind of exposition involves selection, interpretation, arrangement and narration in the author's own words – operations that involve choices at every stage'.[98] As to the influence of non-expository research and researchers Twining concludes:

> …the protagonists of broader approaches to the study of law challenged the dominance of the Expository tradition but, except for a few Marxian critics, did not fundamentally deny its validity or legitimacy. The central precept of those who favoured realism or contextual approaches or socio-legal studies was that for most purposes the study of rules alone is not enough.[99]

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[95] Ernest M Jones, 'Some Current Trends in Legal Research' (1962) J. Legal Educ. 15: 121
[96] William Twining, *Blackstone's Tower: the English Law School* (Sweet and Maxwell 1994) chapter 6
[97] Referring to Tony Becher, *Academic Tribes and Territories* (1st edition SRHE and Open University Press 1989)
[98] William Twining, *Blackstone's Tower: the English Law School* (Sweet and Maxwell 1994) 138
[99] Ibid 142

More recently doctrinal legal research has been described as evidencing a linear structure (from hypothesis through evidence to conclusion), an expository flavour and a focus on written sources of law[100]. The same authors state that doctrinal research might be regarded as 'standard or paradigmatic research in law'[101]. Bartie[102] in 2010, drawing on Vick[103], constructs a list of the hallmarks of the discipline of law:

> The way that 'law' is currently, and has historically, been conceived for the purposes of academic study is fundamental to the discipline's identity. It conveys a great deal about the discipline. It reveals shared 'internal protocols and assumptions, characteristic behaviour and self sustaining values', 'goals', 'concepts, facts, tacit skills and methodologies', 'shared language', a 'common body of learning' and a 'set of approaches and . . . mechanism[s] of problem formation, recognition and solution'; these being the hallmarks of a discipline. It takes us to the essence of the discipline. The 'knowledge and skills involved in academic research and communication form part of the structural properties of disciplinary collectives'.

Before concluding that 'earlier hostilities towards the core have largely dissipated'[104] Bartie continues with an exploration of what she sees as the 'core' traits of traditional legal scholarship referred to as a 'prior orthodoxy':

> These traits include focusing on legal principle (largely that generated by courts but also the legislature); basing argument and prescription on a normative premise which is not unpacked or explained; reacting to events comprising of changes to the law by judges or legislatures; and, looking for deficiencies in legal principles, suggesting ways to improve them or clarifying the law so that judges or legislatures

[100] Arlie Loughnan and Rita Shakel, 'The Travails of Postgraduate Research in Law' (2009) Legal Education Review, Vol. 19, No. 1 & 2, pp. 99-132
[101] Ibid 107
[102] Susan Bartie, 'The lingering core of legal scholarship' (2010) Legal Studies 30.3: 345-369.
[103] Douglas Vick, 'Interdisciplinarity and the Discipline of Law' (2004) Journal of Law and Society, 31: 163–193.
[104] Susan Bartie, 'The lingering core of legal scholarship' (2010) Legal Studies 30.3: 345-369, 369

> can better understand their development. The methodology adopted is likened to that of the courts with primary focus resting on the internal logic of judgments or statute. These traits are captured by the concept of 'doctrinalism' or 'black letter law'.[105]

That this core is 'lingering' is a conclusion arrived at having considered a wide range of writing on the subject of legal scholarship. Of particular interest is the reference to Cownie[106] whose 2004 research of legal academics included this finding: '…on a scale from black-letter at one end to critical studies at the other, half of all the respondents described themselves, without hesitation, as taking a socio-legal or CLS [critical legal studies] approach to teaching and researching law.'[107] Interestingly Bartie does not then take the point that that leaves a half of respondents who did not describe themselves as socio-legal. The criticism of Cownie that is referred to comes from Keyes and Johnstone[108] and it is that Cownie's definition of 'socio-legal' is unrealistic and overly generous. There is a tendency in this debate for *anything* that is in any way contextual (including legal history) or theoretical (the whole of jurisprudence) to be conjoined with empirical investigations and all then referred to as socio-legal. That representation of a dichotomy with doctrinal research is unconvincing and Cownie reaches the conclusion, as did Twining in 1994, that doctrinal research is itself a mixed economy. Bartie sums up Cownie's view with the statement: 'The core is only objectionable when it is presented in its pure form.'[109] That then enables her to refer to an 'ongoing respect' for the 'tenets of the core' and to declare as an important and valuable part of legal scholarship the activity of 'focusing on legislative and judicial principles, addressing law reformers (primarily judges) and writing in traditional subject

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[105] ibid 350. In respect of the phrase 'black letter law' the author quotes from William Twining, *Blackstone's Tower: the English Law School* (Sweet and Maxwell 1994) 151, n 61: 'black or Gothic type which was often used in formal statements of principles or rules at the start of a section, typically followed by commentary'. The description is used (usually in a pejorative sense) to refer to work which makes no reference to any material beyond those formal statements.

[106] F Cownie *Legal Academics* (Oxford: Hart Publishing, 2004)

[107] Ibid 54

[108] Mary Keyes and Richard Johnstone, 'Review of legal academics: cultures and identities by Fiona Cownie' (2005) 27 SLR 377, 379

[109] Susan Bartie, 'The lingering core of legal scholarship' (2010) Legal Studies 30.3: 345-369, 357

areas constructed from the expository tradition….'[110] The mixed economy is then also recognized with Bartie again referring to Cownie as applauding the 'increasing flexibility, the increasing willingness of scholars to mix the traditional methods with new learning and understanding.'[111]

This view of doctrinal method as a core is strongly taken up by Hutchinson and Duncan[112] who declare that 'The doctrinal method lies at the basis of the common law and is the core legal research method' and observe that doctrinal method is 'often so implicit and so tacit that many working within the legal paradigm consider that it is unnecessary to verbalise the process'[113] and in search of a definition review various statements made of legal research including that of the Pearce Commission[114]:

> 1. Doctrinal research — 'Research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments.'
> 2. Reform-oriented research — 'Research which intensively evaluates the adequacy of existing rules and which recommends changes to any rules found wanting.'
> 3. Theoretical research — 'Research which fosters a more complete understanding of the conceptual bases of legal principles and of the combined effects of a range of rules and procedures that touch on a particular area of activity.[115]

They conclude[116] that the description that 'most succinctly delineates the sophisticated higher level thinking which is the hallmark of doctrinal work…' is that of the Council of Australian Law Deans:

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[110] Ibid 357
[111] Ibid 357
[112] Terry Hutchinson and Nigel Duncan, 'Defining and describing what we do: Doctrinal legal research' (2012) 17.1Deakin Law Review 83
[113] Ibid 99
[114] Ibid 101 - Dennis Pearce, Enid Campbell and Don Harding ('Pearce Committee'), *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (Australian Government Publishing Service, 1987) cited in Terry Hutchinson, *Researching and Writing in Law* (3rd edn, Reuters Thomson 2010) 7.
[115] Ibid 101

> Doctrinal research, at its best, involves rigorous analysis and creative synthesis, the making of connections between seemingly disparate doctrinal strands, and the challenge of extracting general principles from an inchoate mass of primary materials.[117]

That said, in referring to the 'academic lawyer's work' they cite Richard Posner:

> The messy work product of the judges and legislators requires a good deal of tidying up, of synthesis, analysis, restatement, and critique. These are intellectually demanding tasks, requiring vast knowledge and the ability … to organize dispersed, fragmentary, prolix, and rebarbative material.[118]

In the end, however, Hutchinson and Duncan reach the point of saying that 'legal research' (they having now dropped the label 'doctrinal') includes facets of the methodologies of other disciplines, listing as examples the methodologies labelled hermeneutic, argumentative, empirical, explanatory, axiomatic, logical and normative[119]. That same list is relied upon by Mathias Siems and Daithi Mac Síthigh[120] in distinguishing 'legal doctrine' from 'practical legal research' with [only] the former incorporating the mix of methodologies.

Hutchinson's most recent work[121] seems cast in the form of a defence of doctrinal research in response to criticisms and attacks on the method. The argument put forward is that the

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[116] Ibid 104
[117] *The CALD Standards for Australian Law Schools* (17 November 2009) http://www.cald.asn.au/docs/CALD%20-%20standards%20project%20-%20final%20-%20adopted%2017%20November%202009.pdf#
[118] Ibid 108 – referring to Richard Posner, 'In Memoriam: Bernard D. Meltzer (1914–2007)' (2007) 74(2) University of Chicago Law Review 435, 437.
[119] Ibid 114 referencing Mark Van Hoecke (ed), *Methodologies of Legal Research Which Kind of Method for What Kind of Discipline?* (Hart Publishing, 2011) vi.
[120] Mathias Siems and Daithí Mac Síthigh, 'Mapping Legal Research' (2012) 71.03 CLJ 651-676.
[121] Terry Hutchinson, 'Doctrinal research: researching the jury' in Dawn Watkins and Mandy Burton *Research Methods in Law* (Routledge 2013)

doctrinal method 'necessarily forms the basis for most, if not all, legal research projects'[122] with the method being essential to law students, post-graduate students, law academics (writing monographs, refereed journals, practitioner information pieces, submissions to government and corporations) and legal practitioners and judges. As to what is meant by doctrinal the view expressed is that it normally involves a two-part process of locating sources and then interpreting and analysing the text, a step that requires the use of deductive logic, inductive reasoning and analogy. Reference is also made to the 'black letter law' label here explained as being the essential task of fitting new material into the existing legal framework with the aim of preserving the logical coherence of the legal system.

Much of the published work in this thesis includes as an essential element what may be described as doctrinal research. This approach is logical and compelling not least because the intended audience is the legal practitioner and the judiciary. To take one example, the 2001 Supplement[123] to *Risk Assessment in Litigation*[124] sought to systematise and explain the first two decisions of the Court of Appeal[125] relating to the recently introduced system of conditional fee agreements. To do so the supplement adopts the techniques above described as doctrinal legal research. It does use legal analysis based upon a lawyer's understanding of how the legal system and especially case law and statutory interpretation operate. The analysis incorporates logical argument to test the meaning(s) capable of being given to these important early judgments. Thus reference is made to the complex possibilities of insurance cover that might be encountered in practice and how that relates to the judgment in *Sarwar* where the insurance position was very straight forward.[126] It incorporates sources from the insurance industry to give context to the legal analysis and it seeks to provide guidance to the practical application of the decisions. All of these ingredients are the essence of doctrinal legal research. *Risk Assessment in Litigation*[127] performed the dual function of presenting doctrinal legal research and the products of

[122] Ibid 7
[123] David J Chalk, *Risk Assessment in Litigation Supplement* (Butterworths 2002)
[124] David J Chalk, *Risk Assessment in Litigation* (Butterworths 2001)
[125] Callery v Gray [2001] ECA Civ 1117 with Callery v Gray (No 2) [2001 EWCA Civ 1246; Sarwar v Alam EWCA Civ 1401
[126] *Sarwar v Alam* [2001] 4 All ER 541 32
[127] David J Chalk, *Risk Assessment in Litigation* (Butterworths 2001)

empirical research into methods of risk assessment. Without the doctrinal research as Hutchinson argues there is no basis for the empirical research. It may also be thought that a title from a legal publisher such as Butterworths must inevitably be based upon rigorous and extensive doctrinal research presented in a form recognised by the legal profession. Without the doctrinal material it is unlikely that the empirically derived materials would have been published, at least not by Butterworths.

Empirical legal research - what is it?

Smits[128] finds four types of legal scholarship which he says reflect the (four) questions that can be asked about the law: How does law read? How ought the law to read? What are the consequences of applying the law? What is law? From that it is the third question that relies upon empirical research for its answer. It is questioning the effect of the law on society or perhaps less ambitiously at least its effect on a given relevant sector of a society. So empirical legal research is research seeking to answer that question – what effect is that law having? Hutchinson and Burns[129] in considering the advantages and disadvantages of using non-doctrinal methods refer to Twining's[130] observations in the 1970s that without such methods there is no systematic or regular reference to the context of the problems the rules of law were intended to resolve, the purposes they were intended to serve or the effects they in fact have. Those questions then could be asked about the changes in the legal rules relating to litigation funding that were to be brought into force in April 2000[131] and in particular the effect that change would have on the approach that litigators might take to assessing the risk of funding their clients through conditional fee agreements.

[128] Jan M Smits, *The Mind and Method of the Legal Academic* (Edward Elgar Publishing, 2012)
[129] Terry Hutchinson and Kylie Burns, 'The impact of "empirical facts" on legal scholarship and legal research training' (2009) 43(2) The Law Teacher 153-178.
[130] William Twining, *Taylor Lectures 1975 Academic Law and Legal Development* (Lagos: University of Lagos Faculty of Law, 1976), 20 cited in Hutchinson and Burns (ibid), 18.
[131] The changes to litigation funding were contained in the Access to Justice Act 1999, Ss27 and 29 and the Conditional Fee Agreements Regulations 2000. All of these provisions came into force on 1 April 2000.

The RAIL project sought to answer that question in advance of the law actually being in force. It looked at the response that litigation lawyers could give to the demands of the change in the law on litigation funding and the removal of legal aid from personal injury cases. Smits goes on to state that empirical legal research 'studies the legal actors, institutions, rules and procedures in order to obtain a better understanding of how they operate and what effects they have.'[132] This then is defining empirical legal research by reference to what it is trying to accomplish and that amounts to a methodology at least in terms that the aims of empirical research are set out and the methods chosen need to be capable of achieving those aims. On the question of methods Smits comments that the empirical approach relies upon methods from disciplines other than law and that empirical legal research will not produce the same level of certainty as will be found in the natural sciences. Referring to Baldwin & Davis[133] reference is made to methods used in empirical legal research being less thorough than those used in political science or psychology and not particularly complex or technical. That we are told however is not a problem at least where the results are plausible and influential.

There is now, but was not in 1998 when the RAIL project was conceived, a considerable body of literature addressing methods for empirical legal research. In 2008 a special edition of the Journal of Law and Society provided an edited collection of accounts of research projects with the aim of informing and inspiring others to conduct empirical legal research.[134] More recently McConville and Chui[135], Halliday and Schmidt[136] and Watkins and Burton[137] have all produced in book form collections of experiences from researchers

[132] Jan M Smits, *The Mind and Method of the Legal Academic* (Edward Elgar Publishing, 2012) 28
[133] John Baldwin and Gwynn Davis, 'Empirical Research in Law', Chapter 39 in Peter Cane and Mark Tushnet, *The Oxford Handbook of Legal Studies* (Oxford University Press 2003) 880-900.
[134] Martin Partington, 'Law's Reality: Case Studies in Empirical Research on Law: Introduction' (2008) 35 Journal of Law and Society 1–7.
[135] Mike McConville and Wing Hong Chui, *Research Methods for Law* (Edinburgh University Press 2007)
[136] Simon Halliday and Patrick Schmidt, *Conducting Law and Society Research* (Cambridge University Press 2009)
[137] Dawn Watkins (Ed) and Mandy Burton (Ed) *Research Methods in Law* (Routledge 2013)

who have conducted empirical legal research. Running to over 1000 pages there is also the Oxford Handbook of Empirical Legal Research[138].

Why is it not being done (more)?

> The work of empirical legal researchers since the last third of the 20th Century has provided Government, the judiciary, law reform bodies, regulatory bodies, universities, social, and economic institutions of all kinds with vital insights into how the law works in the real world. Empirical legal research is valuable in revealing and explaining the practices and procedures of legal, regulatory, redress and dispute resolution systems and the impact of legal phenomena on a range of social institutions, on business and on citizens.

The above is the first statement made in the Final Report for the Nuffield Inquiry on Empirical Legal Research.[139] It is noteworthy that the Nuffield Foundation commissioned this report in 2004 in order, as the Foreword to the Report by Professor Genevra Richardson states, to obtain 'a clearer diagnosis of the reasons why we don't have enough research in law' and the Report established that what was '…especially missing is empirical research, whether quantitative or qualitative. We need to know how law or legal decision-making or legal enforcement really works outside the statute or text book.'[140] The report defined empirical research in law as 'the study through direct methods of the operation and impact of law and legal processes in society…'[141]

The inquiry findings included that empirical legal researchers had worked across a wide range of areas including access to justice and risk, both of which are fields with which the published work for this PhD thesis are concerned. But the inquiry also found that of the

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[138] Cane, Peter and Kritzer, Herbert, (eds.) *Oxford handbook of empirical legal research* (Oxford University Press 2010)

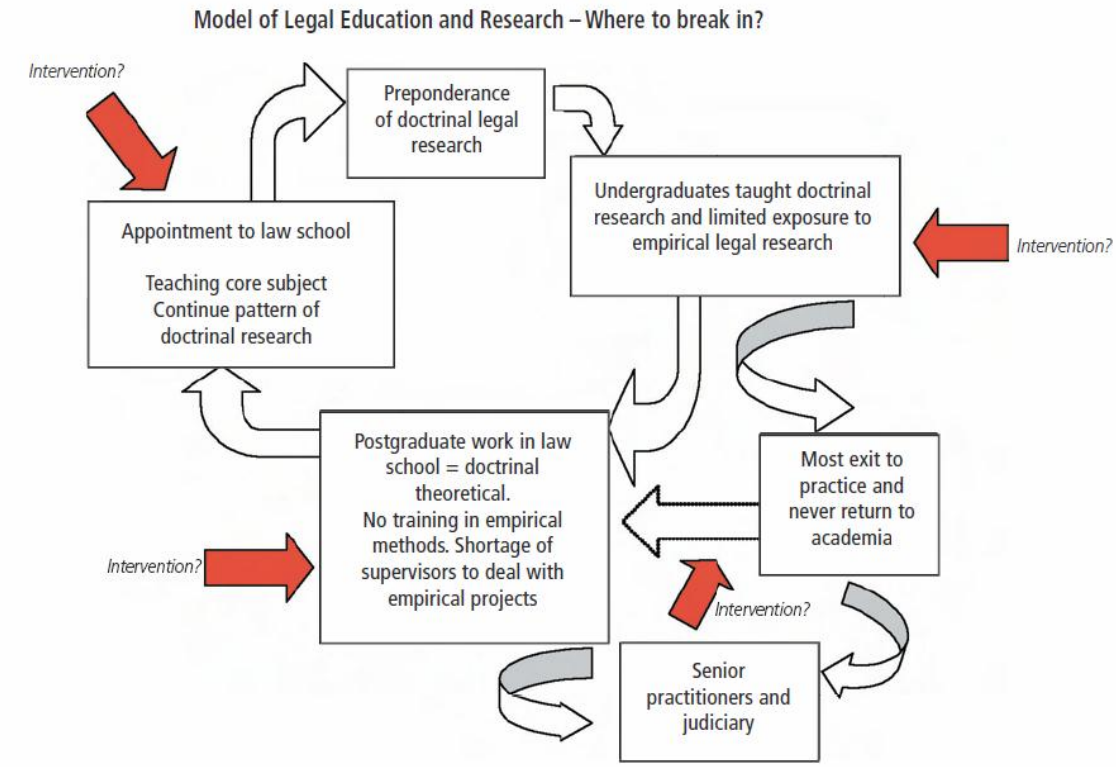
[139] Hazel Genn, Martin Partington and Sally Wheeler*, Law in the Real World: Improving our Understanding of How Law Works: The Nuffield Inquiry on Empirical Legal Research*, (The Nuffield Foundation November 2006) 1
Available at: http://www.ucl.ac.uk/laws/socio-legal/empirical/docs/inquiry_report.pdf

[140] Ibid iii

[141] Ibid 15 and referring to John Baldwin and Gwynn Davis, 'Empirical Research in Law', in Peter Cane and Mark Tushnet, *The Oxford Handbook of Legal Studies* (Oxford University Press, 2003) 880-881.

then membership of the Socio-Legal Studies Association of 400 only a 'small proportion' engaged in empirical legal research.[142] Unsurprisingly the Report confirmed the commissioning body's view that there was a shortage of capacity to undertake empirical research in civil law and justice. The Report also sees a particular problem with civil justice research. In particular reference is made to the 'paucity of centrally maintained basic administrative data on civil justice issues.'[143]

In terms of causes for the lack of capacity the link is made to the Model of Legal education and Research which the Report sets out as typifying University Law Departments and is set out in diagrammatic form[144]:



The Report considers then that the link between legal education and research is dominated by doctrinal research starting with undergraduate legal education focussed on the legal profession and never then moving beyond it and certainly not into empirical research. The

[142] Ibid 9
[143] Ibid 35
[144] Ibid 30

Report also makes some reference to the Research Assessment Exercise but it is in the separately produced Report Summary that the following is stated:

> Despite the official rhetoric, many felt that the RAE gave little incentive to spend the time involved in empirical legal research; it undervalued even important policy-relevant research. There were also fears that collaborative empirical research is less highly valued than sole-authored doctrinal work.[145]

There is, if this is a true picture, a massive discord between the criticisms of doctrinal research (that have produced the literature referred to in the section above on doctrinal research) and the views of the constituents of the RAE panel for law and possibly the dominance of that panel by non-empirical researchers.

For the purposes of this PhD thesis the most important context for empirical research referred to in the Report is that of the regulatory function of government particularly in economic relationships and the need for empirical evidence about the impact of law and regulation; how mechanisms of regulatory control could be improved and adapted and how individuals and organisations respond and adapt to the legal environment.[146] All of the published work forming this PhD thesis lies in the field of the regulation of litigation funding. As a whole it is work that sets out the law (Cownie's pure doctrinal research)[147] but with a considerable body of material drawn from sources other than primary legal sources (Taekem's Moderately internal point of view)[148] and also sets out the concept of risk and approaches to assessing risk based upon the empirical research of the RAIL project.

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[145] H. Genn, M. Partington & S. Wheeler, *Law in the Real World: Improving Our Understanding of How Law Works Report Summary* (November 2006 Nuffield Foundation) 5 Available at: http://www.ucl.ac.uk/laws/socio-legal/empirical/docs/inquiry_summary.pdf

[146] See Chapter 1 RAIL.

[147] F Cownie *Legal Academics* (Oxford: Hart Publishing, 2004) 58

[148] Sanne Taekema, 'Relative Autonomy: A characterisation of the discipline of law' (March 29, 2010). Available at SSRN: http://ssrn.com/abstract=1579992 or http://dx.doi.org/10.2139/ssrn.1579992

The question of why more empirical legal research is not being done was raised in the US, long before the Nuffield Report was commissioned, in an article by Schuck published in 1989[149] which refers to the 'trivial proportion' that empirical research represents out of the work of law professors. Although by empirical research was meant the use of quantitative and statistical methods Schuck's conclusion is, as with the Report, – the incentives system for legal academics and the professional norms of law schools make for a strong resistance to change and that doctrinal research is dominant as a result.

Why should it be done (more)?

The Nuffield Report was concerned then with the lack of capacity to conduct empirical legal research and the reasons for that lack of capacity but it did additionally address the question of the value of such research. Others also deal with the question: why do empirical legal research? Again this question had been asked long before the Report was commissioned and was addressed in 1962 by Jones[150] who set out four characteristics of non-doctrinal research by which the question 'why do empirical research?' can be answered:

> (a) it lays a different and lesser emphasis upon doctrine;
> (b) it seeks answers to broader and more numerous questions;
> (c) it is *not* anchored exclusively to appellate reports and other traditional legal sources for its data; and
> (d) it may involve the use of research perspectives, research designs, conceptual frameworks, skills, and training not peculiar to law trained personnel.

Siems and Sithigh[151] distinguish between three types of legal research: law as a practical discipline; law as humanities; law as social science. It is with the third that perhaps

[149] Peter Schuck, 'Why Don't Law Professors Do More Empirical Research?' (1989) 39 Journal of Legal Education 323
[150] Ernest M Jones, 'Some Current Trends in Legal Research' (1962) 15 Journal of Legal Education 121.
[151] Mathias Siems and Daithí Mac Síthigh, 'Mapping Legal Research' (2012) 71.03 CLJ 651-676.

empirical legal research most clearly belongs and the authors express the view that as a social science the study of law offers the opportunity to challenge the usefulness of court decisions and pieces of legislation from an external and often empirical perspective – that at least provides the aims of empirical research without perhaps really stating what empirical legal research actually is.

Empirical research methods

Having looked at why empirical legal research is not widely done and then at why such research should be done there comes the inevitable question(s) of *how* it can or should be done. There is now available some published guidance as to the methods that might be used in conducting research that can be described as empirical in the sense explored above. In a review of Cryer et al[152] van Gestel[153] expresses the hope that a subsequent edition might place more emphasis on research design and 'what you actually do to enhance your knowledge, test your thesis or answer your research question' rather than on general theories, a criticism that can also be levelled at the Oxford Handbook[154] which for the most part again concentrates on theoretical issues rather than as its title might suggest being a resource of methods for researchers in need of guidance[155]. Halliday and Schmidt[156]is a collection of essays written in a conversational style based on interviews with researchers who describe their research. As such it does provide some insights into how the researchers went about their projects but again it does not provide a formal guide

[152] Robert Cryer, Tamara Hervey and Bal Sokhi-Bulley, with Alexandra Bohm *Research Methodologies in EU and International* Law (Hart, 2011)
[153] Rob van Gestel, 'Research Methodologies in EU and International Law–By Robert Cryer, Tamara Hervey and Bal Sokhi-Bulley, with Alexandra Bohm' (2012) 18.1 European Law Journal 164-166.
[154] Peter Cane, and Herbert Kritzer, eds. *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010)
[155] Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in *The Oxford Handbook of Empirical Legal Research*, in fairness does provide some clear practical guidance as well as pointing to more general issues that must be addressed whatever methods are used.
[156] Simon Halliday and Patrick Schmidt, *Conducting Law and Society Research* (Cambridge University Press2009)

to methods. Indeed even Watkins and Burton[157], whose aim is stated as being to explain in clear terms some of the main methodological approaches to legal research, have not set out to achieve that aim by providing a guide to methods but have collected theoretical perspectives from a range of researchers. McConville and Chui[158] is perhaps the nearest to being a 'how to' guide and it does contain valuable lessons for those undertaking empirical and especially qualitative research.

In the absence of a 'how to' resource for legal research methods it is nonetheless possible, as the above resources demonstrate, to consider the range of methods that are most likely to be suitable for empirical legal research and to reflect in the context of the RAIL project on those choices available then and what choices might have been available in different circumstances.

Choices

Perhaps the first choice to be made in planning empirical legal research is whether to use quantitative or qualitative methods or indeed to employ both. Kritzer explains this as follows:

> The distinctive feature of empirical legal research is the use of systematically collected data, either qualitative or quantitative, to describe or otherwise analyze some legal phenomenon. While many people equate empirical with quantitative or statistical analysis, this need not be the case. Work that is qualitative and systematic is also empirical. Still, as with contemporary empirical legal studies, the empirical legal research of the early twentieth century was largely quantitative in character.[159]

[157] Dawn Watkins (Ed) and Mandy Burton (Ed) *Research Methods in Law* (Routledge 2013).
[158] Mike McConville and Wing Hong Chui, *Research Methods for Law* (Edinburgh University Press 2007)
[159] Herbert Kritzer 'The (nearly) forgotten early empirical legal research' in Peter Cane, and Herbert Kritzer, (eds.) *Oxford handbook of empirical legal research* (Oxford University Press 2010), 883

The collected examples of empirical research in Halliday and Schmidt[160] are heavily qualitative in approach and the coverage of quantitative methods in McConville and Chui[161] and Cane and Kritzer[162] is self contained into single chapters whereas there is very little reference to quantitative methods at all in Watkins and Burton.[163] Twining possibly points to the reason for this apparently heavy bias towards non-numerical methods: 'in my experience most lawyers are innumerate and most law students are terrified of figures' but arguably of more significance, at least in England and Wales, is the absence of centrally collected numerical data relating to the legal system. In the field of civil litigation with which the RAIL project was concerned there simply was not the existing data to make any meaningful quantitative research possible. Sir Rupert Jackson[164] faced the same problem but was able to generate some statistical data by enlisting the help of the judiciary[165] and in recent research of the road traffic portal insurers have made available statistical data that is not in the public domain.[166] These are then rare examples where it is has been possible to use quantitative methods. For the RAIL project the absence of any existing available statistical data relating to litigation precluded any possibility of using quantitative methods, which, together with Twining's observation, probably means that the use of quantitative methods would not have succeeded in producing methods of risk assessment that the profession would embrace. The RAIL project sought to answer the question of what, if any, methods of risk assessment could be found or devised that could be

[160] Simon Halliday and Patrick Schmidt, *Conducting Law and Society Research* (Cambridge University Press 2009). Of the twenty-one contributions only three include quantitative methods

[161] Wing Hong Chui, 'Quantitative Legal Research' in Mike McConville and Wing Hong Chui, *Research Methods for Law* (Edinburgh University Press 2007)

[162] Lee Epstein and Andrew Martin, 'Quantitative Approaches to Empirical Legal Research' in Peter Cane, and Herbert Kritzer, (eds.) *Oxford handbook of empirical legal research* (Oxford University Press 2010)

[163] Dawn Watkins (Ed) and Mandy Burton (Ed) *Research Methods in Law* (Routledge 2013) where there is no chapter dealing with quantitative methods and the word 'quantitative' does not appear in the index.

[164] Rupert M. Jackson, *Review of Civil Litigation Costs: Final Report*. (The Stationery Office 2010)

[165] Rupert M. Jackson, *Review of Civil Litigation Costs: Final Report*. (The Stationery Office 2010) Appendix 1: Tables for chapter 2

[166] Paul Fenn, *Evaluating the low value Road Traffic Accident process* (Ministry of Justice Research Series 13/12 July 2012)

presented to litigators and ultimately adopted in practice. In terms then of the initial investigative research for the RAIL project the methods adopted were qualitative.

Given the choice of qualitative methods there then arises the question of ensuring that the methods chosen are suitable for the objectives of the project and are robust in external terms, are valid, reliable and generalisable. McConville and Chui[167] adopt as their general rules for qualitative research five requirements identified by Fink[168]:

1. Specific research questions
2. Defined and justified sample
3. Valid data collection
4. Appropriate analytical methods
5. Interpretations based on data

Webley's[169] approach sets out similar requirements labelled Research Design (to include sampling, validity, reliability and dependability); Data Generation and Collection (such as by individual and group interviews, third party observation, document analysis and use of case studies) and finally Data Analysis (classical content analysis, discourse analysis and grounded theory). Tracy[170] sets out eight criteria for excellent qualitative research whatever methods are being used: a) worthy topic, (b) rich rigor, (c) sincerity, (d) credibility, (e) resonance, (f) significant contribution, (g) ethics, and (h) meaningful coherence.

Added to this guidance must be the factor, recognised in much of the literature, of the practicalities that the particular project may involve. If the research is funded there may be constraints imposed by the funding body which will necessitate some compromise on some of the factors identified as being the basis of sound qualitative research. In the case of the RAIL project a major constraint was the time scale given that the funding body

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[167] Mike McConville and Wing Hong Chui, *Research Methods for Law* (Edinburgh University Press 2007) 33

[168] Arlene Fink, *Conducting Research Literature Reviews: From the Internet to Paper* (2nd Ed Thousand Oaks, CA: Sage)

[169] Webley, 'Qualitative Approaches to Empirical Legal Research' in Cane, Peter and Kritzer, Herbert, (eds.) *Oxford handbook of empirical legal research* (Oxford University Press 2010)

[170] Sarah Tracy, 'Qualitative Quality: Eight "Big-Tent" Criteria for Excellent Qualitative Research' (2010) 16 Qualitative Inquiry 837-851

required the project to be delivered on time. Relevant also is the fact that methods may well have been chosen and have been required at the stage of application for funding, as was the case with RAIL. To later seek to change the methods might be impossible or if possible so time consuming a process as to be untenable. Practicalities also arise in terms of specific elements of the methods. Access to sources of data might be controlled, so for example in the RAIL project there was no likelihood of a researcher being given access to any information that could be traced to any particular client and certainly no access would be given to case files due to client confidentiality. Methods were chosen therefore that were likely to prove practical. Interviewing litigators was the primary method of the initial funding proposal. As an initial step to obtaining interview subjects a questionnaire stage was used along with significant publicity for the project with a view to generating participation. The questionnaire data was then discussed with the match-funders and informed the questions used in semi-structured interviews with litigators across the country. In terms of testing the findings the time scale of one calendar year for completion from a standing start necessarily limited what might otherwise have been proposed but the combination of access to the expertise of the match-funders and of the feedback from a trial CPD stage proved to be a highly successful method which in effect provided a dry run for the training programme. The use of a CPD based stage as a means of testing before rolling out the intended outcomes of a training programme was therefore an example of an achievable method and one appropriate to the aims of the project. Nonetheless it is recognised that the time constraint was significant and perhaps limited the approach that might otherwise have been taken.

Researching Tacit Knowledge

Recent literature[171] in the field attributes the term 'tacit knowledge' to Polanyi[172] whose observation 'nothing that we know can be said precisely, and so what I call 'ineffable' may

[171] See especially Robert J. Sternberg, Joseph A. Horvath Eds, *Tacit Knowledge in Professional Practice: Researcher and Practitioner Perspectives* (Psychology Press, 1999)
[172] Michael Polanyi, *Personal Knowledge. Towards a Post Critical Philosophy* (Routledge 1958, 1998); Michael Polanyi, *The Tacit Dimension*, (Doubleday 1966 / Anchor Books1967).

simply mean something I know and can describe even less precisely than usual'[173] fits immensely well the attempts to 'download' the tacit knowledge of litigation lawyers in respect of risk. The 1960's pop song 'How do you do what you do to me'[174] encapsulates the problem succinctly.

The RAIL project sought to answer the question whether it was possible and if so how to produce one or more methods of risk assessment for litigation. In hindsight the project quickly encountered the phenomenon of tacit knowledge, not least in the discussions that were had with members of the match-funding organisations. The project at the interview stage, albeit unknown to the researcher, was also to some extent engaged in researching tacit knowledge. It is true however that the methods adopted were designed to reveal explicit knowledge or, if tacit knowledge was being sought, the aim was to convert it to explicit knowledge in a form that would lend itself to dissemination.

As with everything in academia there is of course no agreement as to what is meant by tacit knowledge.[175] Boon and Fazaeli[176] refer to Schon's[177] theory that experience, tacit knowledge or 'knowing in action' allows the practitioner to achieve artistry be exceeding the bounds of technical competence.

[173] Michael Polanyi, *Personal Knowledge. Towards a Post Critical Philosophy* (Routledge 1998) 87. See also 'I shall reconsider human knowledge by starting from the fact that we can know more than we can tell' – Michael Polanyi, *The Tacit Dimension* (Doubleday 1966 / Anchor Books1967).

[174] Written by Mitch Murray produced by EMI in 1963 and performed by the group Gerry and the Pacemakers.

[175] Jasmina Pivar, Ivan Malbašić, and Jelena Horvat, 'Literature Analysis of Transfer and Learning Tacit Knowledge' (2012) *23rd Central European Conference on Information and Intelligent Systems* refer to 'tacit experiential knowledge' as being subconsciously understood and applied as well as being difficult to articulate. They include within the term 'tacit knowledge' such intangible factors as beliefs, experiences and values as well as 'working knowledge'.

[176] A Boon and T Fazaeli 'Professional bodies and continuing professional development: A case study' in S Crowley ed. *Challenging Professional Learning* (Routledge 2014)

[177] Donald A Schon, Educating the Reflective Practitioner Jossey-Bass 1987 cited in Boon and Fazaeli.

Ambrosini and Bownman[178] refer to 'tacit skills' in preference to the term tacit knowledge to emphasise their view that tacit knowledge is about 'doing' and that the word 'knowledge' is objective whereas 'tacit' is subjective – in their view there is a mismatch contained in the phrase 'tacit knowledge'. Dinur[179] managed to identify nine *types* of tacit knowledge[180] in a study that set out to take the debate beyond the dichotomous view that knowledge was either tacit or explicit. The nine types are: Skill; Cause-effect; Cognitive; Composite; Cultural; Unlearning; Taboo; Human; Emotional. Dinar stresses that these nine are not mutually exclusive but in fact overlap, a point made also by Pivar et al[181] in stating that tacit knowledge is not fully tacit and explicit knowledge not fully explicit – each containing an element of the other. Dinur goes on to map each type to the barriers to its transfer and then matches each to the most effective transfer channels. Ambrosini and Bowman[182] are perhaps less optimistic as to the possibilities for transfer of tacit knowledge. They illustrate their point that there are degrees of tacitness as follows:

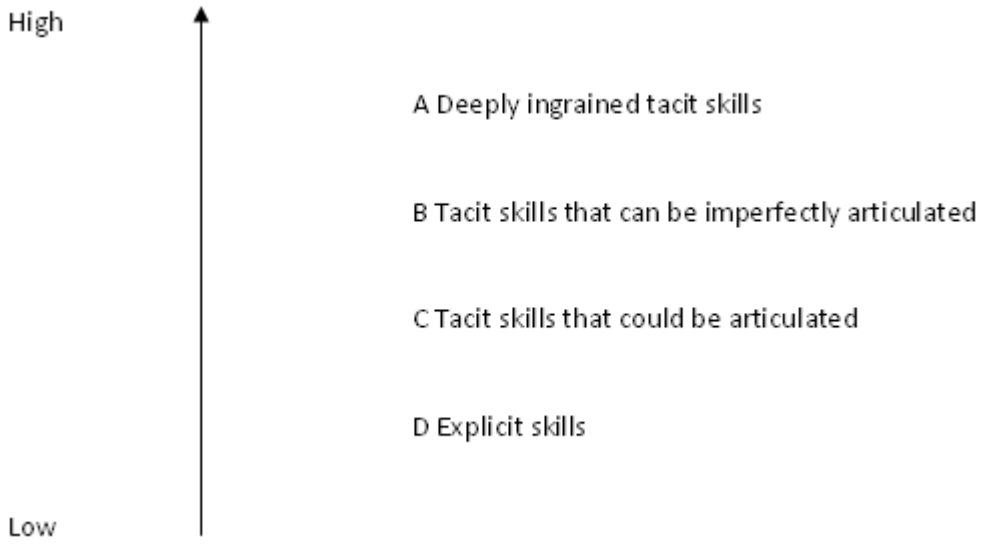
[178] Véronique Ambrosini and Cliff Bowman, 'Tacit Knowledge: some suggestions for operationalization' (2001) Journal of Management Studies 38:6, 811-829

[179] Advar Dinur 'Tacit Knowledge Taxonomy and Transfer: Case-Based Research' (2011) Journal of Behavioral and Applied Management, 12 (3), 246-281.

[180] Dinur refers to 'tacit, implicit or sticky knowledge' (ibid 251).

[181] Jasmina Pivar, Ivan Malbašić, and Jelena Horvat, 'Literature Analysis of Transfer and Learning Tacit Knowledge' (2012) *23rd Central European Conference on Information and Intelligent Systems* 139.

[182] Véronique Ambrosini and Cliff Bowman, 'Tacit Knowledge: some suggestions for operationalization' (2001) Journal of Management Studies 38:6, 811-829, 816



It is then argued that between the two extreme points are two degrees of tacitness that are capable of articulation; the first is tacit because no–one has asked how do you do that? The second whilst not capable of articulation through a normal use of words might be capable of communication through metaphor or storytelling.

The phenomenon of tacit knowledge thus presents at least three difficulties: firstly the individual's ability to recognise their own tacit knowledge; secondly the ability to articulate tacit knowledge; thirdly the ability to manage the transfer of tacit knowledge to others. The RAIL project encountered all three of these difficulties in that the interview stage was to some extent inevitably (and in itself tacitly) seeking to tap into the tacit knowledge of interviewees. The project then sought the articulation of the tacit knowledge of many interviewees and its distillation into a format that would enable knowledge transfer. Of Dinur's nine types of tacit knowledge the RAIL project was dealing with Skill, Cause-effect, Cognitive, Composite, Human and Emotional. Dinur's 'Rich Channel' for the first three is hands on practice whereas Composite and Human might best be addressed through codification and Emotional only through confronting the issue or by the use of psychological tools or by 'apprenticeship'. Retrospectively applying this analysis to RAIL it can be seen that the methods of risk assessment produced by the project are dependent upon some form of hands on practise such as was provided by the CPD stage which cannot be reproduced in book form and which can be classified as complex information

amounting to Composite[183] tacit knowledge. Reflecting on the CPD stage of the project in the light of Dinur's classification leads to the conclusion that Human and indeed Emotional were nonetheless to some extent addressed in the CPD small group environment. This reflection does also lead to the conclusion that the RAIL project at the CPD stage enabled complex explicit knowledge to be transferred in an environment that also enabled participants to identify their own tacit knowledge[184] and to some extent to transfer that to other participants. In that way participants were both sources and recipients of tacit knowledge. At the very least the RAIL participants would have been able to recognise that tacit knowledge played a part in how they currently assessed risk and how they might do so in the future.

The RAIL project had relevance in 1999 due to the imminent removal of legal aid as a funding method for personal injury litigants and its replacement with conditional fee agreements (CFAs). That shifted the financial risk of failure from the public purse to the law firm. Significant also was the requirement of the Conditional Fee Agreements Regulations 2000[185] for an explicit risk assessment to be provided as part of the CFA. That assessment was itself relevant to the recovery of the success fee if the case succeeded. The need to make explicit what was at least in part tacit was therefore a challenge which the project set out to meet and it did so with the belief that a court would not accept as an assessment a statement along the lines of 'in my experience'. The assessment of risk was, therefore, an essential part of recovering fees in cases that won but was also essential in terms of ensuring that the firm's exposure to the risk of losing (and therefore of not being paid at all) was both manageable and managed. Whilst both these external and internal needs could be met by an explicit risk assessment, it is likely that the tacit knowledge of the

[183] Dinur uses this term to label situations 'when a large array of varied, complex information exists' - Advar Dinur 'Tacit Knowledge Taxonomy and Transfer: Case-Based Research' (2011) Journal of Behavioral and Applied Management, 12 (3) 260.
[184] Cate Watson, 'Unreliable narrators? 'Inconsistency' (and some inconstancy) in interviews' (2006) Qualitative Research 6.3, 367-384, 381 referring to Jean Mills, 'Self-construction through Conversation and Narrative Interviews', (2001) Educational Review 53(3): 285–301. 'I didn't know I knew that until I started talking'. Although the use of the word tacit in the phrase tacit knowledge means unspoken, it also significant to reflect that individuals are not conscious of their tacit knowledge (I didn't know I knew that) but can become so during an interaction such as that provided in a CPD workshop.
[185] Conditional Fee Agreements Regulations 2000, SI 2000/692 Reg 3(1)(a)

assessor would be more readily accepted by the firm (internal) that it would be by a court (external).

CPD as a research method

Continuing Professional Development events were a significant feature of the RAIL project. At the development stage, that is, before a formal training programme in risk was launched, CPD activity was used to test the findings from the interview stage. In particular a preliminary account of the framework for risk assessment was presented at a national conference for litigation lawyers under the chairmanship of Iain Goldrein QC. In house CPD events were also held with Blake Lapthorn, one of the match-funders to the RAIL project, in which were trialled the methods of risk assessment that were developed from the interview findings. Given the RAIL project was funded to produce a training solution to risk assessment it had always been intended that CPD activity would be included at the development stage and this proved to be immensely important in fine tuning the methods that were to be included in the final training programme and in the book Risk Assessment in Litigation. It can therefore be claimed that at this development stage CPD was being used in itself as a research method. A very rich source of feedback was provided by having access to litigation lawyers who had no prior engagement with the project (in the case of the national conference) and, in the case of the match-funder, access was gained to a good number of litigators in a large regional firm who were working with their Head of Litigation who was the primary contact for the RAIL project. In the case of the match-funder activity there was a considerable amount of direct input to the project coming out of the workshop activities.

The intended outcome of a training programme in risk assessment was achieved and rolled out across the country in the form again therefore of CPD events. All of these were restricted to small workshops of no more than twenty participants. The format was interactive[186] with a considerable amount of hands on activity.[187] It became clear that such

[186] A Boon and T Fazaeli 'Professional bodies and continuing professional development: A case study' in S Crowley ed. Challenging Professional Learning (Routledge 2014) 34 citing Donald A Schon, *Educating the Reflective Practitioner* Jossey-Bass 1987, refer to the 'habit

events were in themselves a very valuable research method, one that continued after the conclusion of the RAIL project and which has without doubt been highly important to the continued work in the field of litigation funding which forms the published works for this PhD thesis. Whether the CPD event is wholly delivered by the researcher to a small workshop (as was the case with the RAIL activities) or it is an event to which the researcher makes a contribution, the potential for observation and listening is significant. Whilst not according with the accepted meaning of ethnographic methods[188] the ability to 'hoover'[189] up comments made during such events provides rich data which is probably of a different order to any that could be obtained by questionnaire or even by formal interview. Gauging informally the importance (or unimportance) of issues raised in CPD events is just one example of the intelligence that can be researched in this way.

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of reflective practice being inculcated through coaching and mentoring'; the RAIL project suggests strongly that such facilitation is best (and possibly only) achieved in small workshop events.

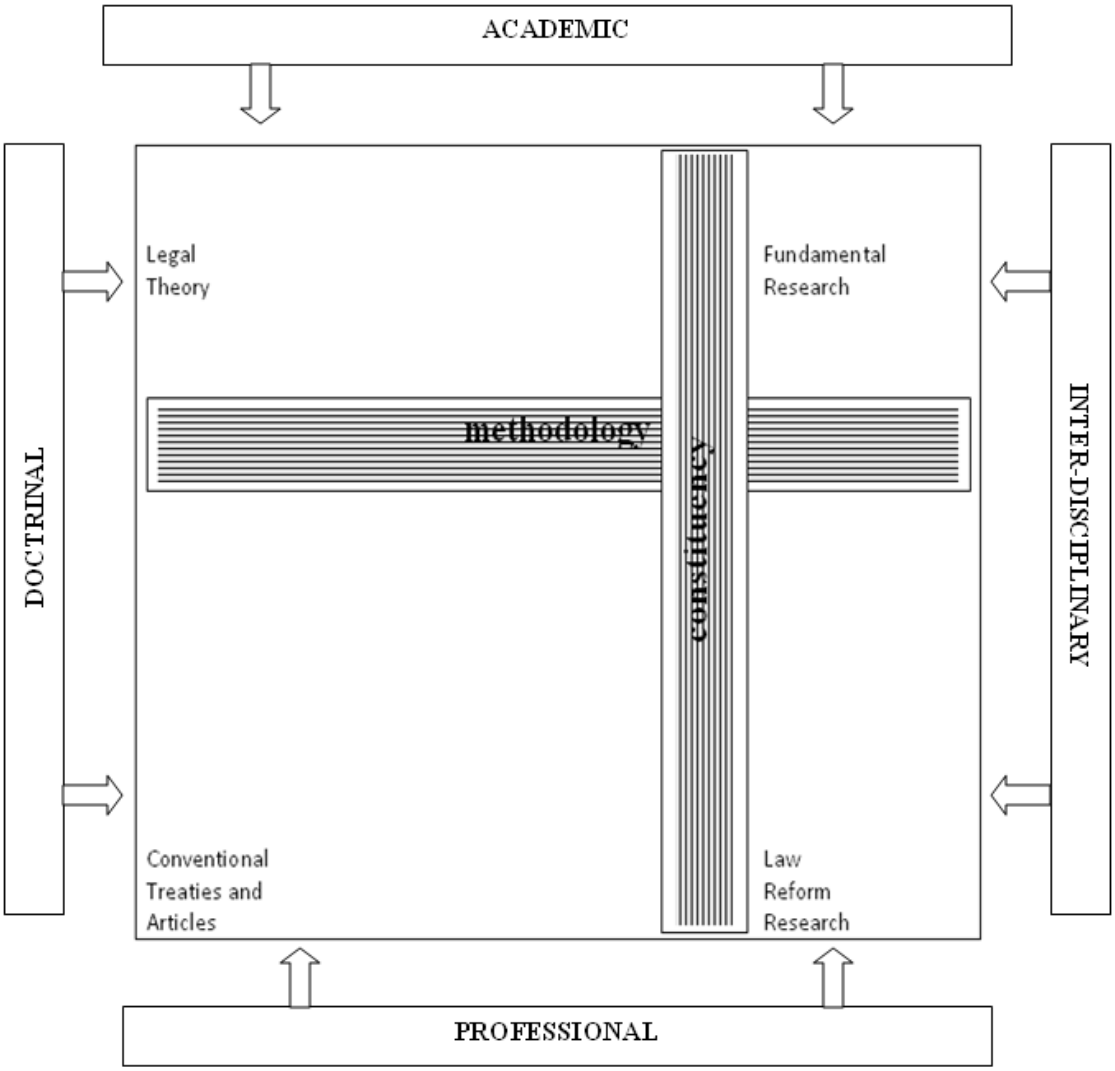
[187] See Tacit Knowledge (above) and Advar Dinur 'Tacit Knowledge Taxonomy and Transfer: Case-Based Research' (2011) *Journal of* Behavioral and Applied Management, 12 (3), pp.246-281.

[188] See in particular John Flood, 'Socio-Legal Ethnography' in Reza Banakar and Max Travers, *Theory and Method in Socio-legal Research* (Hart 2005)

[189] Perhaps not a perfect analogy unless it is at least recognised that the hoover will include filters. The researcher will be selective in what is hovered up and may deliberately move into the dusty corners.

Conclusion

Although dating from 1983 the Arthur's Report *Law and Learning,*[190] described in 1994 by Twining[191] as the 'most ambitious attempt to date to construct a total picture of what academic lawyers do under the name of research in one country', still provides in 2013 a useful picture[192]:



[190] Harry Arthurs, *Law and Learning*, Report to the Social Sciences and Humanities Research Council of Canada by the Consultative Group on Research and Education in Law (Social Sciences and Humanities Research Council of Canada Ottawa 1983)
[191] William Twining, *Blackstone's Tower: the English Law School* (Sweet and Maxwell 1994)
[192] Arthurs Report 126

Each of the four main categories identified by the Arthurs Report is also set out by Twining[193] and it is submitted still provide an insightful analysis:

> (a) "conventional texts and articles—research designed to collect and organize legal data, to expound legal rules, and to explicate or offer exegesis upon authoritative legal sources";
> (b) "legal theory—research designed to yield a unifying theory or perspective by which legal rules may be understood, and their application in particular cases evaluated and controlled; this type would include scholarly commentary on civil law, usually referred to as *'doctrine"*
> (c) "law reform research—research designed to accomplish change in the law, whether to eliminate anomalies, to enhance effectiveness, or to secure a change in direction"
> (d) "fundamental research—research designed to secure a deeper understanding of law as a social phenomenon, including research on the historical, philosophical, linguistic, economic, social or political implications of law."

The published works forming this PhD thesis span much of these broad categorisations of legal research: Chalk 2001[194] provides originality in combining expository doctrinal research, which itself drew on sources beyond the primary sources of law[195], with empirically based applied research from the RAIL project that directly informs Parts 9 and 10[196]. Chalk 2002[197] combines exposition of the new case law with policy issues at a time when the impact of the litigation funding regime on smaller law firms, which from the RAIL empirical research formed a significant sector for the provision of access to justice especially in personal injury cases, was unknown. This work also sought to influence the practice of the legal profession especially in its understanding of legal expenses

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[193] William Twining, *Blackstone's Tower: the English Law School* (Sweet and Maxwell 1994 125 - 126
[194] David J Chalk, *Risk Assessment in Litigation* (Butterworths 2001)
[195] See especially the subject of probability in chapter 3 of this thesis.
[196] David J Chalk, *Risk Assessment in Litigation* (Butterworths 2001), 225-318
[197] David J Chalk *Risk Assessment in Litigation Supplement* (Butterworths 2002)

insurance.[198] These two works together, as their titles suggested, also sought to present the law in the context of legal practice by using the concept of risk which at a minimum adopted the language of a discipline outside of law thus moving across Arthurs' diagram from left to right. Continuing the theme of risk is Chalk 2013[199] where some comparative material is included in an article that focuses on the financial risk that recent government policy has encouraged law firms to undertake. Chalk 2003[200] concerned a change of government policy and was a critique drawing mainly on doctrinal technique albeit again with recognition of issues experienced by practitioners who were themselves the subject of the law rather than their more usual role of advisers to their clients on the law. Chalk 2002[201] drew on doctrinal technique but also an awareness of the reaction of the profession to what appeared to be a change of view by the Court of Appeal having a direct effect on the financial risk taken by solicitors. Chalk 2005[202] focussed again on risk and its management and drew some materials from outside of the English jurisdiction as well as incorporating legal academic work by Twining. Chalk 2005[203] is a further policy orientated article concerned with a decision relating to the legal status and effect of the Professional Conduct Rules of the Law Society with potentially immense significance in the context of a change in government policy towards the regulation of litigation funding by solicitors. There is therefore a meeting of expository doctrinal technique with contextual materials going beyond the mere rules. The practitioner work Butterworths Costs Service is the closest to pure expository doctrinal research in that it is mainly an ongoing exposition and critical commentary of the legislative and case law developments relating to litigation funding and the risks inherent in it.

[198] Ibid 30 - 32
[199] David Chalk, Solicitor client costs indemnities: unregulated insurance or benign assistance? (2013) J.B.L, 1, 59-76
[200] David Chalk, As simple as CFA (2003) S.J., 147(21), 614-615
[201] David Chalk, 'Sounding the retreat' S.J. 2002, 146(35), 831-832
[202] David Chalk, 'Try a different approach?' (2005) Co. L.J., 1(May/Jun), 21-24
[203] David Chalk, 'CFAs after 1 November - a brave new world?' (2005) N.L.J.,155(7201), 1744-1745

APPENDIX ONE

Sounding the retreat

In *Halloran* the Court of Appeal backed away from its decisions in *Callery v Gray*. How has this affected the confusion surrounding CFAs? asks **David Chalk**

A ... House of Lords gave judgment in *Callery v Gray*, Michael Bacon, writing in SOLICITORS JOURNAL (Ongoing concern 31 July 2002 p 630), said:

> "For now, at least in small to moderate claims for personal injury passenger cases, there appears to be no change on the horizon. ...to the level of success fees. ..."

This undoubtedly expressed the belief of all commentators and probably the vast majority of practitioners.

Alas, we were all wrong. The Court of Appeal has now directed that in CFAs entered into after 1 August 2001, the correct success fee is five per cent. It is difficult to find any hint in the judgments in *Callery v Gray No 1* [2001] EWCA Civ 1117 and *No 2* [2001] EWCA Civ 1246 that the Court of Appeal as then constituted intended its judgment to apply only to the past, but that is the effect of the decision in *Halloran v Delaney* [2002] EWCA Civ 1258.

Lord Woolf CJ in *Callery No 1* said it was reasonable to proceed on the premise that at least 90 per cent of RTA cases will settle without proceedings or succeed after issue. The Court concluded that 20 per cent was the maximum uplift that can reasonably be agreed. APIL had submitted figures showing that on a 95 per cent success rate, having allowed for abandoned cases, a success fee of 28.88 per cent was needed. As to the future Lord Woolf was clear:

> "...our conclusion is based on very limited data. In particular, it is too early to see what effect the new costs regime is having on the rate of settlements, and this judgment may itself affect that rate. It will be desirable to review our conclusion once sufficient data is available to enable a fully informed assessment of the position." [105]

In delivering the only judgment in *Halloran*, Brooke LJ (who sat in *Callery v Gray*) said the time had now come to reappraise the appropriate level of success fees in simple claims when they are settled without the need for court proceedings.

> "After taking advice from our assessor, and after considering the arguments in the present case, we consider that judges concerned with questions relating to the recoverability of a success fee in claims as simple as this which are settled without the need to commence proceedings should now ordinarily decide to allow an uplift of five per cent on the claimant's lawyers' costs (including the costs of any costs-only proceedings which are awarded to them) pursuant to their pow-

ers contained in CPD 11.8(2) unless persuaded that a higher uplift is appropriate in the particular circumstances of the case. This policy should be adopted in relation to all CFAs, however they are structured, which are entered into on and after 1 August 2001, when both *Callery* judgments had been published and the main uncertainties about costs recovery had been removed." [36]

[illegible]

Halloran was a road traffic case where the claimant passenger obtained a settlement of £1500 damages. The base costs in the substantive claim agreed between the parties were £910. For the costs-only proceedings a 20 per cent success fee was allowed in the Court of Appeal on the basis that at the time the CFA was entered into the uncertainties surrounding recovery of costs justified such a figure. A five per cent success fee would amount to £45.50 on the costs of the substantive case. On the basis of the usual conversion method, five per cent represents a success rate of 95 per cent and assumes the costs incurred in winning cases and losing cases are at the same levels.

The link between uncertainty as to costs recovery and the size of the success fee dominates the court's reasoning:

> "Our decision on this appeal has been strongly influenced by the uncertainties in the law on costs recovery which preceded the two judgments of this court in *Callery v Gray*. From August 2001 those uncertainties have been removed (subject to any lingering concern until June 2002 that the House of Lords might reintroduce uncertainty by overruling those judgments)." [33]

This is surprising given the full arguments heard in the Court of Appeal in *Callery*, where this aspect of risk was not relied upon at all and does not even appear in the judgment of Lord Woolf CJ. *Callery* concerned arguments over the risks involved in litigation on the basis of the substantive issues in the case. On those issues the court had the advantage of representations of APIL, including figures which, as Lord Woolf made plain, contributed to the decision. Those figures concerned the risks of losing cases and were not based upon any arguments as to the uncertainties over recovery of costs. APIL was not invited to intervene in *Halloran*. The Law Society had been invited to intervene, but only on the matter of whether the Law Society model CFA was intended to cover costs only proceedings.

Seeking to support a success fee on the basis of uncertainties as to recovery of costs is a difficult approach. It was argued by the appellants in *Halloran* that the only risks in costs arose through unreasonable or disproportionate costs. *Callery* itself was mostly an argument about the reasonableness of the size of a success fee. Even the argument in *Callery* that there should be no CFA from the outset, to give time for a response to the claim, was based upon the unreasonableness of an early CFA. To allow a success fee to compensate for the risk that you have acted unreasonably must surely present a contradiction of the whole basis of costs under the CPR. Interestingly, in the context of costs only proceedings, the court in *Halloran* rejected the argument that the risks were all based upon potential unreasonableness, since even today there were some risks in costs only proceedings warranting a success fee.

[illegible]

The Court in *Halloran* refers to settlement without issue of proceedings as the category of case to which the five per cent figure should apply. Lord Woolf's judgment referred to the protocol period when addressing the two-stage success fee and giving the example of a 100 per cent fee to be reduced to five per cent if the case settled before the end of the protocol period. There is a considerable difference here in terms of setting the success fee, and it seems the court in *Halloran* has greatly extended the risk period.

Brooke LJ also refers to all CFAs 'however they are structured' as being subject to the five per cent figure. This would seem to include therefore a CFA with a two-stage success fee as envisaged in *Callery*. The two-stage approach is in any event an application of hindsight, but that hindsight now applies wherever a case settles without issue of proceedings.

It is too early to say whether Lord Woolf's two-stage approach has been used to any effect and whether it has produced early settlements. We now must wait to see whether *Halloran* leads to early issue of proceedings where there has been no settlement, and sometimes no response at all, by the end of the protocol period. There is then the prospect of arguments over when it is reasonable to issue proceedings.

[illegible]

The application of hindsight in this way must also mean the two-stage fee arrangement has to be adopted across the board. There will be cases where proceedings have to be issued, and it is not sensible to suggest these are obvious at the time a CFA is entered into. Given the end of the 20 per cent success fee which enabled all cases to be run, good, bad and indifferent, it is now necessary to ensure the cases that do turn out to be difficult have a success fee to reflect the difficulty. This assumes the success fees can compensate fully for the losses when anything more than five per cent can only be obtained in cases where proceedings are issued.

In theory, there is the alternative of altering the success fee if the case issues or even of entering into a new CFA at such a stage. In practice such options are unattractive. The two-stage fee will also mean either setting it at 100 per cent and inviting challenge or setting it at a figure reflecting the perceived risks in the case on an assumption that proceedings will be issued. Given that losses in cases which issue can now only be covered by success fees in winning cases which issue, it is to be expected that figures at or near 100 per cent will in any event be needed. There are, however, drafting issues in using a two-stage fee if the Law Society model is used.

[illegible]

Callery has had an influence on non-RTA cases, such as *Bensusan v Freedman* 2001 (SCCO Case No: 0104797) and the *Claims Direct Test Cases* 2002 (SCCO, unrep). It may be expected, therefore, that the principle of distinguishing between cases which settle without issue and those which do issue will be carried over to other areas. This will again mean using the two-stage fee as the standard approach – a response that Master Hurst referred to in the *Bensusan* case back in September 2001 as being the reasonable response in future. Two questions remain: how to reach a reasonable success fee as the higher of the two in a two-stage fee; and when it is to apply (at close of protocol or only if the case fails to settle without issue).

[illegible]

Halloran was in fact an appeal concerning whether a success fee could be justified in costs only proceedings, and whether the Law Society model CFA covered such proceedings. As to the model CFA, the court held it did cover costs-only proceedings. The court also allowed a success fee – the same level as applied to the substantive proceedings (20 per cent because the CFA was made before 1 August 2001 – five per cent for later CFAs). If the costs only proceedings were to arise where the higher of a two-stage fee was applicable, it may well be argued that *Halloran* should not be taken to approve an application of the same success fee to the costs only proceedings. Given the same single CFA covers such proceedings, it would have to be argued by the paying party that the court should exercise its power under Costs PD 11.8(2) to award different percentages for different periods ●

[illegible]

There are still a great many uncertainties surrounding the use of CFAs, with many points being taken by paying parties leading to costs disputes and in some cases to claimant solicitors receiving no costs at all, and that is in successful cases. The decision in *Halloran* will be seen to add to the risks involved in providing access to justice and to have done so without representation from the profession at large

David Chalk is principal lecturer in Law at APU and consultant head of risk assessment at LPL

As simple as CFA

FEATURE |30 May 2003

From 2 June 2003 a new simplified CFA can be used. Under this the solicitor cannot charge the client more than the sums recovered from the opponent. The simplified CFA must state that the work will be done for no more than the sums recovered from the opponent. Referring to sums recovered rather than received may lead some to ask what the liability is where sums are agreed or even ordered but not actually received. In an earlier draft of the new regulations provision was made in terms of received or ordered or agreed. In Arkin v Borchard Lines Ltd (No 3) [2001] All ER (D) 187 it was held that recovered meant ordered and was not a reference to actually received. The limitation on the client's liability for own costs is expressly not applicable to a client's liability for any ATE premium. The indemnity principle is to be removed for limited purposes in respect of simplified CFAs and CCFAs by bringing into force s 31 of the Access to Justice Act 1999, amending the CFA Regulations and CCFA Regulations and amending CPR 43.2 (see Lawbrief pp 530-1). This is to provide that own costs limited by the CFA to sums awarded against or agreed by the opponent are recoverable. Chief Master Hurst held two weeks ago in TAG test cases Tranche 2 that a CFA which expressly limited liability in the event of winning to sums recovered was not in any event a breach of the indemnity principle. Nonetheless, it is important to remember s 31 is an enabling provision which does not remove the indemnity principle. The only change to the indemnity principle is specifically in relation to the new form of CFA.

There will therefore be two types of individual CFA and two types of collective CFA. These simplified agreements differ from the standard agreements in that they limit a client's liability for own costs to the sums recovered from the opponent. Many solicitors have taken clients on this basis, but there were dangers in actually telling the client they would not have to pay more than was recovered. The indemnity principle is to be removed for this purpose. It is not being wholly abolished – the changes specifically refer only to CFAs and CCFAs. Significantly, in the simplified CFA the client's liability to pay own costs is not limited to costs recovered – it is limited to sums recovered. The impetus for change is made clear in an LCD paper submitted to the Costs Forum of the Civil Justice Council in December 2002. Two main concerns are raised: 1) That the CFA Regulations are too complicated and do not serve client needs, especially where the intention is that the client will not pay costs, win or lose; 2) That technical errors in CFAs are being used to avoid or delay payment of costs. The paper recognises the need for consumer protection as a relevant consideration in any move to simplify the regulations. The changes now before Parliament and the change to the CPR apply only to CFAs where own costs are limited to sums recovered so that all the problems recognised in the LCD paper remain untouched for CFAs which do not include such a limitation.

Individual CFAs

If a simplified CFA is used, Regs 2, 3 and 4 of the CFA Regulations 2000 do not apply. This means the CFA need only state:

- The proceedings to which it applies.
- The circumstances in which fees are payable. If there is a success fee it need only state (in addition to the above):
- Brief reasons for the percentage success fee.
- Permission to disclose if ordered to do so.

The information to be given to the client no longer includes other methods of financing the case or reference to reasons for recommending insurance. The only information required is the circumstances in which the client may have to pay own costs. This must surely include an explanation of the liability on a failure under Pt 36, unless the client is to have no liability. A simplified CFA can make the client pay own costs, whether recovered or not, if they fail to co-operate, fail to attend for medical examination or court, fail to give instructions or withdraw instructions. These are some of the circumstances in which the client will have a liability to pay own costs, including any success fee, and must therefore be explained. There is no requirement to explain or give any information to the client about assessment of own costs. This change fits an assumption that the liability for own costs is limited to recovered costs. The liability is, however, not so limited – it is limited to sums recovered – ie it includes damages. To omit the consumer protection provisions as to assessment appears to be driven by an erroneous assumption as to the basis of the client's liability. Given that own costs can come from damages, is it appropriate to dispense with the requirement to state whether a success fee is limited to a percentage of damages? Furthermore, ought there to be a requirement to spell out that the liability for own costs could swallow all of the awarded damages? If it was not the intention to permit such an outcome, the drafting ought to have referred to costs rather than sums. In an earlier draft the CFA was to limit liability to the costs received or ordered or agreed. The result is to remove all consumer protection while providing a wording which can deprive the client of the whole of the damages. A CFA that states the client's liability to pay costs is limited to recovered costs comes within the wording of the new regulations and arguably would best reflect the intention behind the changes, but it does raise difficulties over Pt 36.

Part 36

A simplified CFA must limit a client's liability to the level of sums recovered. There is then a difficulty with shifting the costs risk to the client for failure on Pt 36. The Law Society model for the standard CFA allows for base costs (no success fee) to be charged for work done after a Pt 36 offer has been rejected where ultimately that offer is not beaten. The risk is significant since on losing a Pt 36 the successful party only recovers the surplus of costs ordered in their favour over costs ordered against them. This could make the sum in respect of costs recovered seriously deficient. Under the simplified CFA the client's liability to own costs is made referable to 'sums' recovered 'whether by way of

costs or otherwise'. So the client has a liability to pay own costs out of damages even under a simplified CFA unless it expressly uses the word 'costs' rather than 'sums'. The LCD press release of 9 May 2003 claims that the new rules will enable solicitors to 'guarantee to clients that they will get all the damages awarded'. Such a guarantee can only be given if the solicitor is prepared to take the risk on Pt 36 of in effect ending up with no net costs recovery. The simplified CFA does not necessarily guarantee all, or indeed any, damages will go to the client. If the CFA does limit the client's liability to recovered costs, the solicitor is taking the risk on Pt 36 shown above. This will raise concerns as to the pressure on solicitors in giving advice to clients upon receipt of a Pt 36 offer. Of course the advice might be that the client should ensure they have an ATE policy which pays adverse costs in a Pt 36 situation without taking account of favourable costs ordered. But if the client has no liability in such a situation where is the need to insure and what is the insurable risk? In any event the own costs shortfall (£800) will not be covered on a CFA ATE policy. If the limit is expressed as sums recovered, the client's liability can be met from damages, clearly an insurable risk.

Collective CFAs

The CCFA Regulations 2000 are amended to enable a CCFA to state that own costs are limited to sums recovered. If the CCFA does provide that the client's liability is limited in this way then, unlike the individual CFA, no explanation need be given as to the circumstances in which the client will have to pay own costs. (Client, for the purposes of the CCFA regulations 2000, means the recipient of the advocacy or litigation services.) The client may or may not be the funder under the CCFA. The same difficulties with Pt 36 will arise for CCFAs although, presumably, where the client and the funder are not the same person, the client and the solicitor will look to the funder for payment. The major complication for CCFAs is the lack of clarity in the original regulations as to the legal basis for saying an individual recipient of legal services who is not also the funder has any liability to pay for them. That lack of clarity remains after the amendments have been made. The only change to the indemnity principle relates to a CCFA where the client's liability is limited to sums recovered. This presupposes that it is the CCFA, to which the client may not be a party, which imposes on the client (as distinct from the funder) a liability to pay own costs.

The legal analysis of the liability of a client to pay own costs under a CCFA has been considered in two recent decisions which took very different routes. In Gliddon v Lloyd Maunder, Case No JOH 0211064, 31 January 2003, SCCO Master O'Hare held the CCFA Regulations do not create an exception to the indemnity principle and the agreement is between the legal representative and the funder only, but there was a 'linkage' between the client and the funder such that the client had a liability. That does not make the client a party to the CCFA and must mean the individual has a CFA which must (and would not) comply with s 58 of the Courts and Legal Services Act 1990 (CLSA). In Thornely v Lang, Claim No NE 204504, 25 February 2003, Field J held that the indemnity principle will only be complied with if there is an obligation on the claimant rather than the funder (a union) to pay. It followed that the

individual's liability constituted a conditional fee agreement but it in no way satisfied s 58 CLSA. Nonetheless costs were awarded on the basis of the CCFA because s 58A(6) CLSA gave a general power to award costs requiring the payment of any fees under a conditional fee agreement. There is a difficulty here in that the individual CFA was unenforceable and the CCFA is not an agreement between the individual and the solicitor. The true basis on which a CCFA operates is that the funder has the only liability to pay for the legal services (see diagram above). Where the funder is not also the client, any award of costs will fail to satisfy the indemnity principle. The provisions to be introduced from 2 June do not affect these issues. Section 31 was intended to permit changes to the CPR to reflect CCFAs. Section 31 is commenced on 2 June but the only change to the CPR is to deal with liabilities limited to sums received.

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Garbutt v Edwards: costs recovery and CFAs

Features

Costs

David Chalk

is a principal lecturer in law at Anglia Ruskin University, contributing editor to Butterworths Costs Ser-vice and consultant to LawAssist

CFAs after I November--a brave new world?

The Court of Appeal in Garbutt v Edwards [2005] EWCA Civ 1206 was concerned with a breach of r 15 of the Solicitors Practice Rules 1990 and the Solicitors' Cost Information and Client Care Code 1999 through failure to provide a costs estimate. It was unsuccessfully argued by the paying party that such a breach meant the funding agreement was invalid and that therefore under the indemnity princi-ple the paying party had no liability in costs.
If this decision is of general application to all breaches of the Practice Rules, then it is of immense sig-nificance after the revocation of the CFA regulations from 1 November.

Revocation of the Conditional Fee Agreements Regulations 2000 (SI 2000/692) is achieved by the Conditional Fee Agreements (Revocation) Regulations 2005 (SI 2005/2305), with the intention that regulation of CFAs be transferred to the Law Society. Government policy following consultation is summarised in a Department for

Constitutional Affairs paper, New Regulation for Conditional Fee Agreements (August 2005, CP(R) 22/04):

"We will repeal the CFA and CCFA regulations for all agreements entered into on or after 1 November 2005--the necessary regulations will be laid shortly. We will rely on the primary legislation to provide the minimum government legislative framework for the use of CFAs by legal representatives and professional regulation to provide the practical governance of the use of CFAs. This would very clearly focus primary responsibility for all client care, contractual and guidance matters on solicitors and the Law Society's professional rules of conduct, supporting costs guidance and proposed new model CFA." (p 9)

Code amendment on liability

An amendment has been made to the Law Society code to include a provision that in the case of CFAs the client is to be provided with an explanation of liability for their own and opponent's costs, their right to assessment of own costs and an explanation of any interest the solicitor may have in rec-ommending a particular policy or other funding. That amendment came into force also on 1 November.
Prior to this date, these and much more were requirements of the CFA Regulations 2000, material de-parture from which rendered the CFA unenforceable. The unenforceability of the CFA is expressly provided for in s 58 of the Courts and Legal Services Act 1990 as substituted by s 27 of the Access to Justice Act 1999 and it is that statutory provision that has led to the challenges to CFA validity. The original wording of s 58 did not expressly declare a non-compliant CFA unenforceable.
From 1 November, s 58 will only render unenforceable a CFA that is in breach of the requirements in s 58 itself: it must be in writing, relate to a type of case that the statue allows to be run on a CFA and it must specify the success fee which must not exceed 100%. That leaves the question of the effect of a breach of the code.

Status of the rules

The essential question thus becomes the status of the Practice Rules. Rule 15 requires compliance with the code. This was the question raised in Garbutt in respect of a different part of the code and in a case that did not involve a CFA. The court, consistent with earlier cases, accepted without discussion that Swain v Law Society [1982] 2 All ER 827 decides that the rules have the force of subordinate leg-islation but it then reached the conclusion that the breach of r 15 in the case of a failure to provide a costs estimate does not render the retainer unlawful and unenforceable.

Earlier decisions following Swain v Law Society concerned breaches of rr 7 or 8 both of which are concerned with potential champerty. It was in Hughes v Kingston Upon Hull City Council [1999] 2 All ER 49 that Swain was first used to strike down a fee arrangement made in breach of one of the Prac-tice Rules, r 8, which prohibits contingency fees not permitted by law. Swain was not concerned with the legality of contracts entered into or performed in breach of the Practice Rules, but Lord Diplock there said that those rules have the same effect as if contained in a Schedule to the Solicitors Act 1974 under which they are made. On that basis the High Court in Hughes refused to follow the Court of Appeal's now famous decision in Thai Trading v Taylor [1998] 3 All ER 65, Rose LJ finding "unan-swerable" the submission that a retainer made in breach of r 8 was unenforceable (at p 55).

Swain was similarly central to the decisions of the Court of Appeal in Mohammed v Alaga [1999] 3 All ER 699 and Awwad v Geraghty [2000] 1 All ER 608. In Alaga the contract in breach of r 7 was a fee sharing arrangement between a solicitor and an interpreter who referred clients to the solicitor. Ger-aghty concerned an unwritten agreement that a solicitor would charge a lower hourly rate if the case lost, a breach of r 8. In both cases the court held the contracts to be illegal an unenforceable.
It is thus in that context and with the impending change in the CFA regime in sight that the decision in Garbutt was reached. Although no reference is made to CFAs or the move to Law Society regulation of them, the decision had to avoid the conclusion that breaches of the Professional Rules render re-tainers unenforceable if it was not to strangle the new regime at birth.

The life line in what might otherwise have seemed a hopeless task was found in Geraghty. There, while finding that the breach of r 8 was fatal, the Court of Appeal did not do so on the basis that any breach of a Practice Rule will render a contract unenforceable:

"Although no doubt not every trifling breach of the Solicitors' Practice Rules would render a transaction with which it was concerned unenforceable, in my view an arrangement to receive a contingency fee contrary to r 8(1) would make the fee agreement which it comprised unenforceable. That was the conclusion of this court where there was a breach of r 7 of the Solicitors' Practice Rules, which forbids fee sharing, in Mohamed v Alaga & Co (a firm) [1999] 3 All ER 699. In the context of enforceability, I can see no distinction of substance or quality between an unlawful contingency fee arrangement and an unlawful agreement to share professional fees." ([2000] 1 All ER 608 May LJ at p 633)

In Garbutt the court approaches the question by reference to that view and on general illegality princi-ples. On the basis of St John Shipping v Joseph Rank Shipping Ltd [1956] 3 All ER 683 the effect of breach of the rules is a matter of construction and whether the purpose of the rule can be achieved without rendering the contract unenforceable.

Arden LJ then proceeds to examine r 15 and more particularly the code and its notes. The conclusion reached is that the provisions as to costs estimates do not render the contract unenforceable. In par-ticular not every breach of the code is a breach of r 15 and there are subjective judgments to be made as to whether a costs estimate in all cases must be given at all. Those factors are seen as being in-consistent with a conclusion that breach renders a contract unenforceable.

In Alaga and in Geraghty it was the public interest involved that led the court to strike down the con-tracts rather than any fine point about whether the rule in question sought to prohibit the making of contracts rather than regulate their performance. In Garbutt the public interests in the protection of the client and the avoidance of unnecessary legal costs was, although the court does not expressly say so, achievable without the contracts being unenforceable. The Law Society can determine the fees payable by a client where r 15 is breached and it can impose a penalty on the solicitors. It was ob-served that there needs first to be a complaint made by the client to the Law Society but that did not weaken the point.

The severity of the consequence of concluding that breach did render the contract unenforceable forti-fied the court in its conclusion that that was not the effect of the rule. That did not sway the court in Alaga or Geraghty where it appears that to achieve the purpose of the rules it was necessary to render the contracts

unenforceable. There is nothing in Garbutt to suggest that the earlier decisions would not stand today.

Retainer enforceable

Thus in the interpretation of the provision relating to costs estimates we have the answer that the statutory provision (the code is brought into the rules by r 15) does not render a retainer unenforce-able. From 1 November the new provisions of the code concerned with CFAs apply and as with the cost estimate provisions they do not specify the consequences of failure to comply. Although arguably this part of the code is intended to apply before the CFA is made, ie it concerns the formation--not per-formance--of the contract; it is again a matter of interpretation as to whether the effect of the provision is to render the contract unenforceable. Garbutt was argued on the basis of performance rather than formation of contract but formation and performance are treated together in the court's rejection of the argument on illegality. The public interest to which the new provision is aimed is the protection of the client, the same interest to which the costs estimate requirement is aimed, and the same Law Society sanctions are available. Failure to comply ought not therefore to render the retainer unenforceable.

Effect on paying party

The court in Garbutt having decided that the retainer is not unenforceable then goes on to consider whether a failure to provide a costs estimate can have any effect on a paying party's liability? The court makes it clear that it will be only in exceptional circumstances that there will be grounds to re-quire a receiving party to prove that an estimate or an adequate one was given. A costs judge must be sure also that had such estimate been given it would have had a calculable and not immaterial effect on the costs claimed.

As to whether a breach of the new CFA specific parts of r 15 could have any effect on a paying party's liability the approach is likely to be the same. Breach would have to make it likely that the costs claimed are higher than they would have been had the code been followed. It is conceivable that a failure to disclose an interest in a policy or funding method may have led to a more expensive policy or method being used than would otherwise have been used although that is not easy to see. Unless that is likely however, Garbutt should mean that no point is taken on the basis of the new code provisions.

Critics of the government's new policy may observe that when we had the fierce consequences of the CFA regulations we also had the fierce Alaga and Geraghty cases but that now the regulations are gone so too is the apparent ferocity of Swain. They may ask why the reprehensible behaviour in all of these and other cases where breach of the CFA regulations was fatal has, from I November, been downgraded to such an extent--and does it mean that such behaviour will no longer happen or does it mean that adequate protection to clients is now provided by the Law Society? Whatever the merits of such questions, after Garbutt the role of the paying party in policing the behaviour of receiving party solicitors has gone.

CFAs post-Campbell

The one concern for paying parties that does remain and was highlighted in Campbell v MGN [2005] UKHL 61 [2005] All ER (D) 215 (Oct) (see NLJ 4 November 2005 p 1660) is the choice of funding method. Revocation of the CFA regulations and the Garbutt decision on r 15 mean that failure to in-vestigate alternative and less expensive funding methods will not lead to the windfall of no liability for any costs at all.

The Campbell decision looked at the Costs Practice Direction, s 11.8(c), which refers to what other methods of financing the costs were available to the receiving party. That, said the House of Lords, did not include an examination of the receiving party's own ability to fund the case. Campbell leaves, how-ever, cases such as Sarwar v Alam [2001] 4 All ER 541 and Samonini v London General Transport Services Ltd [2005] EWHC 90001 (SCCO) concerning available existing insurance and Bowen v Brid-gend County Borough Council (2004) SCCO Ref: 0309853 and Hughes v London Borough of Newham [2004] EWHC 90050 (Costs) use of legal aid but in all such cases this now becomes a mat-ter of what costs to allow rather than an argument as to the validity of the entire retainer.

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Costs: Part 36 offers and late acceptance

David Chalk

Subject: Civil procedure. **Other related subjects:** Contracts

Keywords: Costs; Estoppel by convention; Offer and acceptance; Part 36 offers

Legislation: Civil Procedure Rules 1998 (SI 1998 3132) Pt 36

Cases: C v D [2010] EWHC 2940 (Ch); [2011] 1 W.L.R. 331 (Ch D)

Gibbon v Manchester City Council [2010] EWCA Civ 726; [2010] 1 W.L.R. 2081 (CA (Civ Div))

Sampla v Rushmoor BC [2008] EWHC 2616 (TCC) (QBD (TCC))

***C.J.Q. 133** *Legislation* : Civil Procedure Rules 1998 (SI 1998 3132) Pt 36

Case : *Roop Sampla v Rushmoor BC* [2008] EWHC 2616 (TCC)

The modification to Pt 36 that came into force on April 6, 2007[1] and which followed a Department for Constitutional Affairs consultation, "Part 36 of the Civil Procedure Rules: Offers to settle and payments into court" (January 12, 2006), has in respect of late acceptance of Pt 36 offers produced a fair share of case law teasing out the intention behind the changes and culminating in the Court of Appeal's decision in *Gibbon v Manchester City Council*[2] that the ordinary rules of contract have no application.

Given that the regime of Pt 36 has always consisted in the making of offers and in the provision of time limits in respect of acceptance and the consequences of failing to accept, the question of late acceptance is not new,[3] but from April 6, 2007 the potential for late acceptance has increased and may be seen as more of a risk to those making Pt 36 offers than as a natural or helpful consequence.

For the purposes of this note the important changes to Pt 36 were the removal of the need for court permission for late acceptance (unless a trial has commenced) and the new provision for acceptance at any time. The DCA consultation gave no hint of the breadth of these changes, concentrating instead on the removal of the payment into court process. The Rules Committee[4] has therefore made significant changes which themselves depart from the law of contract in a rule that uses the terminology of the law of contract, notably, offer and acceptance. *Gibbon* has given emphasis to the provision that the only method for withdrawing an offer is by the giving of written notice of withdrawal, so that unless that has been done all Pt 36 offers remain susceptible of acceptance. There is some muddying of these waters in that Pt 36 provides also for a change in the terms of an offer which appears to have the effect of withdrawing the original terms.

Support for the view that the ordinary principles of the law of contract applied to the pre-2007 Pt 36 can be found set out in the judgment of MacDuff J. in *Pankhurst v White,*[5] where a claimant sought to do what Aldous L.J. had described in *Scammell v Dicker,*[6] namely to keep the

advantages of having made a Pt 36 offer while at the same time treating it as at an end due to its rejection. There is of course ***C.J.Q. 134*** nothing to prevent an offeree in such circumstances making their own Pt 36 offer. MacDuff J. held that the offer had not been withdrawn but was nonetheless not open to acceptance. In doing so no doubt was cast on the words of Dyson J. (as he then was) in *Pitchmastic v Birse Construction,*7 that the law of contract governed Pt 36 (pre-2007), or on the decision in *Scammell,* that Pt 36 did not seek to exclude the general law of contract.

*Sampla v Rushmoor BC*8 is referred to by the Court of Appeal in *Gibbon* and concerned a contribution dispute for damage caused by paving work carried out by the second defendant, Crowley, on behalf of the first defendant. Crowley had settled the claim brought by the claimant and then made a Pt 36 offer to the first defendant in respect of contribution. The first defendant refused to make any contribution at all, and the matter of contribution therefore came to trial. At the conclusion of submissions on behalf of Crowley the first defendant sought the court's permission to accept the Pt 36 offer. That application was resisted on several grounds: (a) that the offer had been rejected and could therefore not later be accepted; (b) there was an implied term that the offer could not be accepted once a trial had begun; (c) the acceptance was prevented by estoppel by convention; d) the court should not grant the necessary permission to accept.

Each of the first three arguments failed in terms reflected in the *Gibbon* decision. As to the first, Pt 36 is entirely silent as to offers that are rejected. But it is plain (r.36.9(2)) that an offer may be accepted "at any time" and even though the acceptor has made an earlier counteroffer. That latter position being entirely opposite to the ordinary law of contract supported the view that under Pt 36 now an offeree can first reject but then accept an offer--there could be no rational distinction between counteroffer and rejection. In any event, it would be contrary to the overriding principle in the CPR to reach the conclusion that a party that has changed their mind and was willing to accept the costs consequences of such a change was nonetheless prevented from accepting a previously rejected offer. To prevent acceptance would have the further effect of giving the costs advantage to the offeror but at the same time prevent a change of mind by the offeree. With respect this ignores the simple route of the offeree making its own Pt 36 offer.

As to implying a term into the offer to the effect that it was not open for acceptance once trial had commenced, Coulson J. saw r.36.9(3) as making it plain that given the court's permission is needed at such a stage, that must presuppose that acceptance is possible.

Estoppel by convention was dismissed on the facts simply because there was no evidence of any common assumption that the offer could no longer be accepted.

Because a trial had begun, however, the fourth argument came into play, namely the exercise of the court's discretion. The circumstances of the offer, its rejection and any change in circumstances were all relevant in this case and in a way that under the 2007 wording does not occur unless a trial has begun. On the facts the court refused permission. The offeree was seeking at a very late stage in the trial to accept an offer where it was clear from the course of the trial up to then that the position of the parties

had markedly changed.

***C.J.Q. 135** *Sampla* is a significant illustration of the stark nature of the amended Pt 36 in those cases that do not reach trial, the full implications of which are seen in *Gibbon.* It must also be borne in mind that pre-trial acceptance of a Pt 36 offer produces an automatic stay of proceedings and not just the potential costs consequences of acceptance.

It seems clear then that *Calderbank*9 offers do not follow the same pattern as the new Pt 36, and it must be questioned as to whether Pt 36 is made still more unattractive to defendants given the unequal costs consequences as between defendants and claimants, and that Pt 36 does not permit of offers on costs.

There are two further and intriguing features of the offer made in *Sampla.* First, it was an offer by one defendant to another in respect of contribution. The wording of Pt 36 would require a decision at least in some circumstances as to whether that was to be regarded as a claimant's Pt 36 offer or a defendant's Pt 36 offer--the cost consequences vary according to that distinction. Secondly, the offer was made expressly to exclude any offer in respect of D1's costs incurred as against D2. CPR r.36.2(2)(c) requires a Pt 36 offer to specify a period (not less than 21 days) in which "the defendant" will be liable for the claimant's costs under r.36.10 if the offer is accepted. An offer that does not set out such a period fails to comply with Pt 36, and it is difficult to unravel quite how the offer by Crowley did comply with this requirement. If it be assumed that the offer is to be treated as a claimant's offer then all that changes is that r.36.2(2)(c) would still need to specify the period but do so in terms that D1 would be liable for D2's costs--in the circumstances of *Sampla* that is unarguable. We are left wondering if the offer actually complied with Pt 36 at all. If it did not then ordinary rules of contract would have applied. It is noteworthy at this stage to observe that Pt 36 is unpopular with defendants precisely because it does not permit of any offer on costs other than to take liability in accordance with r.36.10. In many situations defendants make offers outside of Pt 36 in order to include an offer on costs falling short of the consequences of r.36.10--seemingly what Crowley sought to do here. Non-compliance with Pt 36 requirements continues to be fertile ground for avoiding uncomfortable results, and is recently illustrated in the Chancery Division in *C v D.*10 Here the offer purported to be a Pt 36 offer but was expressly time limited so as to prevent late acceptance but at the same time preserve the costs consequences if rejected. The offeree sought to accept the offer over a year after it had been made and within a month of trial. Warren J. held that a time-limited offer cannot constitute a Pt 36 offer even though expressly intended to have Pt 36 consequences. It followed that the offer could not be accepted after expiry of the express time limit. This view therefore closes immediately one of the potential answers to *Gibbon,* namely to build into the offer some provision to prevent late acceptance. If that is done the offer fails to comply with Pt 36, the essence of which is that an offer must remain open for acceptance unless and until withdrawn by notice. A party can make a valid Pt 36 offer and at the same time give notice of withdrawal, but that will release the costs consequences of Pt 36, not the result that this claimant sought.

C.J.Q. 2011, 30(2), 133-135

1. See Editorial (2009) 28 C.J.Q. 289.

2. [2010] EWCA Civ 726.

3. See I.R. Scott, "Withdrawal and Late Acceptance of Payment in Court" (2002) 21 C.J.Q. 73; Professor A.A.S. Zuckerman "CPR 36 Offers" (2005) 24 C.J.Q. 167.

4. See Professor A.A.S. Zuckerman, "Rule Making and Precedent under the Civil Procedure Rules 1998: Still an Unsettled Field" (2010) 29 C.J.Q. 1.

5. [2010] EWHC 311 (QB).

6. [2001] 1 W.L.R. 631 CA. See Professor A.A.S. Zuckerman, "CPR 36 Offers" (2005) 24 C.J.Q. 167.

7. Unreported, Case No.1998/TCC/590.

8. [2008] EWHC 2616 (TCC).

9. *Calderbank v Calderbank* [1976] Fam. 93 CA.

10. [2010] EWHC 2940 (Ch).

Part 36: a game of trumps

David Chalk looks at reforms to part 36, and examines how it will work with QOCS

The first day of October this year saw the 57th update to the Civil **Procedure Rules, and the** first stage of implementation of the **Jackson Report in seeking** to reverse the decision of the Court of Appeal in *Carver v BAA* [2008] EWCA Civ 412. At the other end of that month (31 October), a Civil Justice Council experts' workshop took place to consider, among other things, implementation of the Jackson proposals on part 36 and qualified one-way costs shifting (QOCS).

Lord Justice Jackson provided his views to that workshop in a paper delivered as his third lecture on the implementation programme. This article explores the Carver reversal and the challenges faced by the workshop in shaping part 36 in the light of QOCS – a tale not for the squeamish.

IMPLEMENTING JACKSON – THE PRESENT

Carver

The Court of Appeal took the view that a change in wording to part 36, brought about in the 44th update to the CPR effective from 6 April 2007, must represent an intended change in how part 36 was to work. The now infamous words 'more advantageous' were then taken to mean that merely exceeding a part 36 offer in money terms was not sufficient, or at least was not the whole story. The revisiting of that by the Court of Appeal in *Gibbon v Manchester City Council* [2010] EWCA Civ 726 still left open the 'Carver factor' as illustrated in *Rowles-Davies & Others v Call 24-7 Ltd* [2010] EWHC 1695 (Ch) where the court took the straightforward view that since the Court of Appeal in *Gibbon* acknowledged it was bound by its own decision in *Carver*, then so was the High Court. The Carver factor was still to be taken into account, and that meant that the unrecoverable costs involved in taking the case to trial were relevant.

The 1 October change

To reverse *Carver*, the Rules Committee produced an additional sub rule to CPR 36.14. By 36.14(1A), 'more advantageous' means better in money terms by any amount, however small, and 'at least as advantageous' shall be construed accordingly. Quite what a litigant in person will make of this convolution can only be imagined, and it is not clear why 36.14 was not rewritten to achieve the desired result. There is the further complication, and not just for litigants in person, that this change is not retrospective – a point not stated in the rules. CPR changes are brought about by statutory instrument. In this instance it is The Civil Procedure (Amendment No.2) Rules 2011 [2011 No. 1979 (L. 17)]. There it is made explicit that the new 36.14(1A) only applies to offers made on or after 1 October 2011.

Consequences

For part 36 offers made before 1 October 2011 that remain open (see *Gibbon v Manchester City Council*), *Carver* is still alive to the extent that the decision survives *Gibbon*. It seems permissible for a claimant to withdraw any such offers now, and make a new part 36 offer post 1 October to replace them, thus taking advantage of the new rule. It seems to be to the advantage of a defendant to not replace pre-October offers, since the Carver rule will continue to apply to them. As for part 36 offers made on or after 1 October 2011, a claimant who at trial obtains a penny more than the defendant's offer will be entitled to enhanced costs. If the claimant at trial matches their own offer they will be entitled to enhanced costs and so on.

IMPLEMENTING JACKSON – THE FUTURE

10% of the value of the claim

Lord Justice Jackson's final report makes recommendations in respect of part 36 in terms of increasing the penalty on a defendant who refuses a claimant's reasonable offer. That change is to be achieved by introducing a new penalty of 10% of the value of the claim being awarded. That will include future pecuniary loss and costs of care. The reform is in the context of the removal of recoverable success fees, and much of the discussion in the report and since focuses on compensating for that lack of recovery. Nonetheless, the 10% award is not confined to cases run on a CFA. For claimants who are on a CFA, the 10% bonus is intended to help pay the success fee. It seemingly works no matter how late in the process the claimant makes their winning part 36 offer, although the bonus of course requires the co-operation of the defendant in getting the matter to court. Immediately we see a snag – the claimant's costs bill, and with it the success fee, increases as trial approaches. The defendant settles just before trial. No bonus, but a high success fee in money terms. If the case does get to trial, the risk to the defendant is an extra 10%. For repeat defendants (that is, for the vast majority of personal injury claims), that additional cost on a few cases pales into insignificance if compared with the additional liabilities currently included in the costs bill. The sting of the new penalty is removed before we begin.

There is a conundrum over how part 36 sanctions will work alongside QOCS

So much for the risk to defendants. The risk to the claimant on the other hand is potentially catastrophic. The full picture only begins to emerge if we look at part 36 in combination with qualified one-way costs shifting.

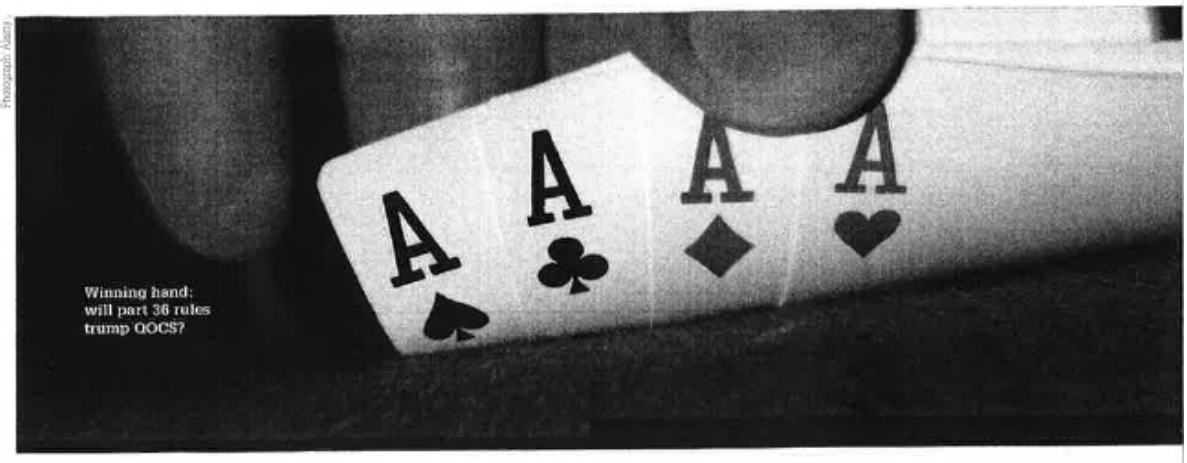
QOCS and part 36

Why have we got QOCS? The effects of abolition of recoverable ATE premiums are intended to be alleviated to some extent by QOCS. This is true only for personal injury and clinical negligence. In all other litigation, from housing disrepair through judicial review to defamation and claims by small businesses, recoverability will go, but there will be no compensating QOCS. Given that the rationale for QOCS is the concern that abolition of recoverability will seriously restrict access to justice, the conclusion we must draw is that outside of PI and clinical negligence the government has no concern about the effect on access to justice. In terms of part 36, the 10% additional penalty will apply to all cases, whether QOCS applies or not. There will be no recovery of ATE premiums in any litigation, and success fees in personal injury will be capped at 25%.

Part 36 in cases where QOCS will apply

It is with the interaction between part 36 and QOCS that the experts' workshop had the most difficulty. To facilitate discussion the CJC provided a 100-page document. In it the following is identified as the

REFORMS TO PART 36



Photograph: Alamy

Winning hand: will part 36 rules trump QOCS?

critical policy question:

Whether the rejection by a claimant of a defendant's part 36 offer which was not subsequently beaten should of itself be regarded as 'unreasonable' conduct as a matter of course.

The CJC paper sets out the pros and cons of a yes and no answer to the policy question: if yes then it is admirably clear and would not differ from the current part 36 regime. But it would leave claimants with adverse costs risk and a need for ATE insurance, contrary to a policy aim of the reforms. If the answer is no then we face uncertainty of a 'nuanced approach' to part 36, and the necessity of satellite litigation to test it.

So the workshop was faced with the conundrum of how part 36 sanctions are going to work alongside QOCS. If QOCS was to mean that part 36 loses all of its sanctions against a claimant, then how would part 36 work at all? But then if some or all of the existing part 36 sanctions were to apply under QOCS, how would the policy aim of removing the need for ATE insurance be achievable?

The CJC paper considered three possible outcomes for a case where a defendant has made a part 36 offer which the claimant then fails to beat. The three possible outcomes are:

1. QOCS trumps part 36

2. Part 36 trumps QOCS

3. Part 36 trumps QOCS but only up to the level of damages and/or costs recovered.

1. This means that part 36 does not create its own separate 'qualification' to QOCS. A claimant who fails to beat a defendant's part 36 offer would therefore only be ordered to pay any costs if their behaviour was unreasonable (this returns to the critical policy question set out above of course.)

We do not know what if any guidance will be given for costs orders where a claimant loses the protection of QOCS. Potentially, a claimant could lose 100% of damages and have a residual liability for own disbursements and success fee and any unrecovered costs where they have failed to beat a part 36 offer – they will have succeeded for CFA purposes and thus have an own costs liability.

2. This is a simple application of part 36 as it is now, so that QOCS has no protective effect at all on the costs consequences. The working paper acknowledges the high risk this creates for claimants, especially where a defendant makes a part 36 offer early in the claim. It could give rise to strong incentives on claimants to settle too early (or to under-settle), and the size of this risk would surely necessitate ATE insurance of some kind, undermining the QOCS policy aim. If this option is adopted the paper rightly points out that that is the end of one-way costs shifting – it remains two-way after the offer is made.

3. Given the perverse potential of option 2 that a claimant who partially succeeds would be worse off than one who lost completely, the hybrid option 3 looks more sensible. It would limit the claimant's liability by linking it to either the damages and/or the costs recovered by the claimant. Opinions differ over whether the link should be to damages or costs. But for an uninsured claimant on a CFA, that distinction would not matter – they would have a huge liability for their own unrecovered costs.

The example of Medway Primary Care Trust and Ashiq Hussain v Sebastian Marcus [2011] EWCA Civ 750

The enormous difficulty of the concept of QOCS with part 36 perhaps needs no further illustration, but if it does then this clinical negligence case provides it.

The respondent had brought a clinical negligence claim seeking damages in respect of an amputation, with quantum agreed at £525,000. The appellants successfully defended on grounds of causation. The respondent succeeded only to the extent of £2,000 in respect of pain and suffering for a limited period of time following a breach of duty. The current costs landscape led to four judges producing three different views: the Court of Appeal disagreeing with the trial, and Jackson LJ dissenting from the view of his fellow appeal court judges. As for the effect of the reforms on such a case, the combined application of QOCS, non-recoverable success fees, part 36 sanctions and no ATE really needs no further comment.

David Chalk, of the department of law, University of Winchester, is also consultant to LawAssist and Commercial Litigation Funding Ltd.

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Solicitor client costs indemnities: unregulated insurance or benign assistance?

David Chalk*

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Keywords: Champerty; Costs; Funding arrangements; Indemnities; Insurance contracts; Legal expenses insurance; Public policy; Regulated activities; Solicitors' powers and duties

Legislation: Third Parties (Rights against Insurers) Act 1930 (c.25)

Third Parties (Rights against Insurers) Act 2010 (c.10)

Legal Services Act 2007 (c.29)

Cases: Dix v Townend (Costs) [2008] EWHC 90117 (Sup Ct Costs Office)

Lewis v Tennants Distribution Ltd (Costs) [2010] EWHC 90161 (Sen Ct)

Sibthorpe v Southwark LBC [2011] EWCA Civ 25; [2011] 1 W.L.R. 2111 (CA (Civ Div))

Digital Satellite Warranty Cover Ltd, Re [2011] EWCA Civ 1413; [2012] 2 All E.R. (Comm) 38 (CA (Civ Div))

*J.B.L. 59 Abstract

This article considers the absence of a definition of contract of insurance in English law in the context of legal expenses risk. It discusses Dix v Townend, Murray Lewis v Tennants Distribution Ltd and Sibthorpe v Southwark LBC, and the provision of indemnities by solicitors in respect of client liability for opponent's costs and issues of champerty and public policy. It considers regulatory issues under the Financial Services and Markets Act 2000 *, the* FSA *and the* SRA*, the applicability of the Law Society Delegated Professional Body exemption for insurance mediation, and the application of the* Third Parties (Rights Against Insurers) Act 1930 *and* 2010 *. The article also considers the implications of the Jackson reforms to litigation funding, and the potential impact of the* Legal Services Act 2007 *deregulation of the provision of legal services. It refers to* Law Commission Consultation Paper No.201: Insurance Contract Law: Post Contract Duties and other Issues (December 2011)*;* Law Commission Consultation Paper No.189: The Illegality Defence*;* Law Commission Issues Paper 4: Insurable Interest (January 2008)*;* Law Reform Commission consultation paper: Insurance Contracts (Republic of Ireland, 2011)*; and Re Digital Satellite Warranty Cover Ltd.*

Introduction

Since the introduction of conditional fee agreements1 (CFAs) into the English legal system in 19952 and more particularly since the recoverability from losing opponents of success fees and insurance

premiums3, many and varied business ***J.B.L. 60*** models4 have emerged which seek to exploit the litigation funding landscape. A model given recent but very brief consideration by the Court of Appeal5 involved solicitors providing an indemnity to their client for adverse costs. In English law the normal rule is that costs follow the event.6 The losing party ordinarily bears the legal costs of the winning party. Under a CFA the risk of own costs is borne, wholly or in part, by the solicitor running the case. The condition upon which a client will be liable for the fees of their own solicitor is commonly success in the litigation. A CFA can, however, provide that some fees are to be paid win or lose (sometimes referred to as a partial CFA).7 In *Sibthorpe* the solicitor additionally provided an indemnity to the client for any costs the client was ordered to pay to the opponent. The client's potential liability to the opponent included losing the case but also failing to beat a Pt 36 offer. contains provisions under which a party winning litigation at trial but recovering less than has been offered by the opponent can be ordered to pay their opponent's costs from the date on which the offer could have been accepted.8 It has been pointed out that the decision as to which cases to bring is influenced by, among other factors, legal expenses insurers,9 i.e. those taking the funding risk. Two forms10 of legal expenses insurance are available and are explored below. If it is the case that the decision to bring a case is influenced by the funding risk, then it is all the more so where the risk of adverse costs is being taken by the solicitor.

Chief among the contexts in which the solicitor is providing an indemnity for costs is the absence in English law of a definition of a contract of insurance.11 The absence of definition has importance in the context of regulation, client protection, the availability of third-party rights and the future shape of the provision of legal services. The seemingly distinct and recognised concept of a contract of indemnity (and of guarantee) is also called into question, if only in order to conclude that a contract of indemnity12 or guarantee13 might also be a contract of insurance.14 That ***J.B.L. 61*** the indemnity is provided by the solicitor running the litigation then raises the context of regulation of solicitors by the Solicitors Regulation Authority. That the risk being indemnified could have been covered by an insurance product from an insurance company raises the context of the Law Society Delegated Professional Body (DPB) scheme15 under which from January 14, 2005 insurance mediation could be conducted by solicitors without FSA regulation. The DPB scheme does not permit solicitors to provide insurance. That the solicitor is running a financial risk depending upon the outcome of litigation16 raises the context of maintenance and champerty and potentially wider public policy interests. The indemnity in *Sibthorpe* would only be required if the litigation failed or under Pt 36. The client was also represented under a CFA, which itself meant that the solicitor's own costs were dependent on the outcome. The provision of an indemnity fits uneasily with policy statements surrounding litigation funding by solicitors arising out of *Thai Trading Co (A Firm) v Taylor*.17 All of the above are current contexts for the decision in *Sibthorpe* that endorsed the provision of indemnity. Looking to the future shape of legal services requires consideration not only of the impending reform18 of civil litigation in England and Wales but also the introduction of alternative business structures for law firms under the Legal Services Act 2007. Ultimately the lack of clarity as to what is a

contract of insurance might even lead to the question of whether a conditional fee agreement is such a contract, especially after *Digital*.

The relationship of insurance to legal expenses

Although hackneyed, it is not inappropriate to begin with the concept of insurance as set out in the Preamble to an English statute of 1601:

"[B]y means of which policies of assurance it cometh to pass on the perishing of any ship, there followeth not the undoing of any man, but the loss lighteth rather easily upon many than heavily upon a few…." 19

In essence it is a contract under which those with no interest in the risk undertake to indemnify those whose interest is such that loss would be catastrophic. Indeed the essence of insurance soon became one of spreading the risk among many who had no interest in it. Those venturing into litigation in England and Wales do so at the moment20 faced with the general rule that costs follow the event—the loser pays. This position is set out in the preliminary report of Sir Rupert Jackson as follows: ***J.B.L. 62***

"The 'loser pays', 'costs shifting' or the 'follow the event' principle. The general rule is that the unsuccessful party will be required to pay the costs of the successful party (although the court may make a different order) CPR 44.33. This is known as the 'loser pays', 'costs shifting' or 'follow the event' principle. It is also sometimes referred to as the 'English rule', when contrasted with the regime in the USA." 21

There is therefore a significant risk in terms of adverse costs orders. Additionally the litigant has a liability for their own legal costs. The CFA regime was introduced in 1995 to provide access to justice for personal injury victims and to remove the burden of funding that litigation from the publicly funded legal aid scheme. The CFA solved the problem of own costs by enabling the solicitor22 to take the risk of not being paid if the case failed. The risk of adverse costs, however, was seen as necessitating an insurance solution. The launch of CFAs in 1995 was thus accompanied by the availability of after the event (ATE) insurance policies, so called because the insurance policy is put in place after the event that is being litigated has taken place,23 which were developed during the 1990s. It covers future liability for the costs of an opposing party and usually covers other costs risks such as own counsel's fees, expert fees, court fees or other disbursements. ATE was rare in the early 1990s but increased after 1995 when CFAs were first permitted. An account of the development of BTE and ATE insurance and CFAs is contained in the *Jackson Preliminary Report*.24

The Law Society was instrumental in establishing ATE as a practical necessity where a CFA was used in personal injury cases by endorsing an ATE product known as Accident Line Protect,25 made available only to Law Society personal injury panel members. By that endorsement the professional norm was set that CFAs are offered to clients in tandem with ATE insurance to ensure that the client's adverse costs risk is contained. In 1995 an Accident Line Protect premium of £8526 was required for £100,000 cover but by1997 premiums for personal injury policies almost doubled to £161.20, and in respect of road traffic accidents to £95.68. By April 2005 premiums had increased again to £375 for road traffic cases, £815 for other personal injury claims and £1,175 for occupational disease

cases. Other providers of ATE insurance sought similar or higher premiums and schemes such as Claims Direct saw premiums climbing beyond £1,000. The size of premiums, at least in the case of Accident Line Protect, must be a clear indicator of the level of risk being taken by the insurer.

The significance of ATE insurance to the viability of the CFA regime was such that the increasing size of premiums which had to be paid for from damages became a matter of political concern following press campaigns highlighting cases where total deductions from damages reached 90 per cent or more. The response was to ***J.B.L. 63*** introduce "recoverability". Section 29 of the Access to Justice Act 1999 27 made provision for rules to allow the court to order the party ordered to pay the costs in litigation to pay the premium on any after the event insurance policy taken out by the receiving party in respect of costs, whether or not the receiving party has entered into a CFA. In combination, the recoverability provisions in respect of insurance premiums and success fees paved the way for solicitors to be able to offer litigation services on the basis that there would be no deductions at all from damages.

It is instructive to note the terms of s.29 in respect of insurance:

"Where in any proceedings a costs order is made in favour of any party who has taken out an insurance policy against the risk of incurring a liability in those proceedings, the costs payable to him may, subject in the case of court proceedings to rules of court, include costs in respect of the premium of the policy."

The "risk of incurring a liability" extends not only to adverse costs but also to own costs. The scope of s.29 was immediately challenged by liability insurers to whom the burden of the premiums had now shifted. In *Callery v Gray*28 the Court of Appeal reached the conclusion that Parliament's intention had been to provide access to justice and it rejected restrictive interpretations of s.29. The section extended to any "insurance against the risk of incurring a costs liability that cannot be passed on to the opposing party".29 Since 2001 ATE premiums have been challenged in terms of calculation method and often simply on the basis of disproportionality to the value of the claim. An indication of the levels that can occur is given in the RSA test cases,30 where the insurer sought a £153,378 premium for a claim worth £250,000. The premium allowed by the court was £41,708. Again the level of premium can only be taken as an indication of the level of risk being borne by insurers.

The solicitor's indemnity cases

The CFA regime alongside ATE legal expenses insurance with recoverable premiums is the context in which solicitors have been prepared to provide contractual indemnities to their clients for their adverse costs risk. The legality of such agreements has been challenged in three instances with mixed results, but in no case was the contract found to be a contract of insurance. The public policy that is given far greater prominence in these decisions is that of champerty and maintenance rather than insurance.

Dix v Townend31

This was a serious road accident personal injury claim with a value of

£675,000. The CFA had a (recoverable) 25 per cent success fee and the total claimant costs ***J.B.L. 64*** were £146,000. The CFA contained the following term: "In any event, we will indemnify you against your opponent's charges and disbursements in case you lose." The paying party challenged the CFA on two grounds: that it was champertous and that it constituted illegal insurance. The incentive for a paying party to challenge the funding arrangements of its opponent is that no costs at all will be payable if the funding arrangement is found to be illegal as contrary to public policy.32 The court's decision was that the term of the CFA was contrary to public policy (akin to champerty) but that it was not insurance.

The public policy relied upon stemmed from an earlier decision in the Court of Appeal concerned with the provision of expert services in connection with litigation:

"The public policy which is in play in the present case is that which weighs against a person who is in a position to influence the outcome of the litigation having an interest in that outcome." 33

The decision in *Dix v Townend* (*Dix*) was that Lord Phillips's words include anyone in a position to influence litigation, and that any form of material interest including the avoidance of a liability to pay adverse costs was a sufficient material interest and therefore contrary to public policy, albeit not champerty proper. Looking at the level of risk in this particular case led the Deputy Master to the following conclusion:

"[T]he nature of this particular indemnity clause being a broad, uncapped, potentially large liability apparently unsupported by a fund or insurance policy, triggered upon the loss of the case whatever the cause, places the solicitor in the position of having too much at stake." 34

The basis of the illegal insurance challenge to the CFA was the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001. Article10 provides that (1) effecting a contract of insurance as principal is a specified kind of activity35; (2) carrying out a contract of insurance as principal is a specified kind of activity. Article 3 and Sch.1 to the Order provide as follows: art.3 deals with interpretation and provides that "contract of general insurance" means any contract falling within Pt I of Sch.1; Sch.1 para.17 includes "Legal expenses", defined as "Contracts of insurance against risks of loss to the persons insured attributable to their incurring legal expenses (including costs of litigation)". The court concluded that "the definition is circular it is limited to the point where it comes close to being no useful definition".36 Nonetheless it was necessary to arrive at a conclusion as to whether the indemnity amounted to a contract of insurance. Three elements were identified as being essential for a contract of insurance: first, that the contract as a whole has as its principal object the provision of an indemnity; secondly, that it indemnifies against an uncertain event which is beyond the control of the insurer, ***J.B.L. 65*** which, thirdly, is more or less adverse to the interests of the insured. An application of those three requirements produced the following conclusion:

"[T]he contract contained one element having the character of insurance (namely an indemnity which covered loss of the case for reasons outside the solicitor's control as well as reasons within the solicitor's control), this agreement looked at as a whole had as its primary object the supply of legal services on a CFA basis by a solicitor to a client." 37

Murray Lewis v Tennants Distribution Ltd[38]

Murray Lewis v Tennants Distribution Ltd (*Lewis*) saw a different costs judge facing similar arguments as in *Dix* but with a very different result. The value involved in *Lewis* was considerably lower than in *Dix*, involving an accident at work with a claim of £15,000. Nonetheless own costs reached £74,000 including an 80 per cent success fee. The client was represented under a CFA that included the following term:

"IF YOU LOSE

In the unlikely event that you lose your claim, we will make no charge whatsoever for our legal work. Further, you will not have to repay us for any legal expenses (disbursements) we have incurred on your behalf and we will cover your opponent's charges. Therefore, you will have nothing to pay. If we have taken out an insurance policy on your behalf, we will make a claim under it to recover your legal expenses and opponent's charges …."

As in *Dix* the CFA in *Lewis* was challenged on two grounds: champerty and unlawful insurance, but only the argument on champerty was heard.[39] It was held not to be champertous on the basis that there was no maintenance (officious intermeddling in litigation) and there cannot be champerty without maintenance. In any event champerty required a benefit to be obtained and a risk of loss was not a benefit. The policy behind champerty related to the duty of those who conduct litigation, and the obligation here as to adverse costs would not have the effect of tempting a solicitor to stray from the path of rectitude. Although the issue of insurance was not addressed, the following statement of the court is perhaps a clear enough indication of the likely outcome had that argument been heard:

"So far as I am aware it is not, or is not yet, a long standing practice of solicitors to shoulder the risk of adverse costs orders. Nevertheless I cannot believe that such an interest would jeopardise the integrity of a solicitor. I reach that result without reference to the individual circumstances of the solicitor in question or his record of success in other cases in which he has offered similar terms to clients. It seems to me the protection which litigants have here rests in the professionalism of the persons whom statute allows to conduct litigation in this country. ***J.B.L. 66*** " [40]

The costs judge relied upon a further ground for upholding the legality of the arrangement which was that there was no breach of any of the Solicitors Practice Rules. This latter ground is a further vehicle for the operation of public policy alongside champerty and maintenance. Breach of the Solicitors Practice Rules is a breach of subordinate legislation[41] and potentially[42] therefore will render a contract illegal. This aspect of public policy and the regulation of solicitors is discussed further below in the context of the decision of the Court of Appeal in *Sibthorpe*.[43]

Sibthorpe and Morris v Southwark LBC[44]

Sibthorpe reached the Court of Appeal but it is instructive to consider the decision from its first instance origins through to the Court of Appeal. These were two cases heard together once they reached an appeal to the

High Court and thence the Court of Appeal. Each was a housing disrepair claim brought against the London Borough of Southwark. In the *Morris* case the claim value was £10,000 and in *Sibthorpe* £1,300. In each case the client was represented under a CFA with a 10 per cent success fee. In Morris own costs were £13,000 and in Sibthorpe £8,000. In each case the CFA contained the following term:

"If you lose, you pay your opponent's charges and disbursements. You may be able to take out an insurance policy against this risk. If you are unable to obtain an insurance policy against this risk, we indemnify you against payment of your opponent's charges at the end of the case if you lose. This means that we will pay those charges."

There was a similar provision to cover Pt 36 45 failure and any interlocutory adverse costs orders.

At first instance all costs were disallowed on grounds of champerty. It was held that the solicitor was underwriting the clients' liability for adverse costs and that amounted to the solicitor having a financial interest in the outcome of the case and was thus champertous. At the first appeal46 champerty was again argued, as was the unlawful insurance argument seen in *Dix*. In the High Court Macduff J. held that the modern law of champerty was case specific and there were no public policy reasons on these facts against the indemnity. As to insurance, Macduff J. relied on *Callery v Gray*47 (*Callery*) where in the context of the meaning of s.29 Access to Justice Act 1999 the Court of Appeal had said that "Insurance is the purchase of an indemnity against the risk of loss caused by a fortuity".48 It was held that the legal test to be applied was as set out in *Callery* and that the CFA was not an unlawful contract of insurance. The only factor in that definition to which Macduff J. makes any reference is that of purchase. It had been argued that purchase is not a necessary requirement of a contract of insurance. That argument was seemingly ***J.B.L. 67*** dismissed simply by reference to the definition in *Callery* which makes reference to purchase. The significance of purchase in *Sibthorpe* is that it goes to the question of whether there is a contract of insurance. That was not the issue at all in *Callery*, and the reference to purchase was entirely consistent with the facts in *Callery* where policies of insurance were provided by insurance companies and premiums were charged that attracted insurance premium tax. There was no question of those arrangements not being contracts of insurance. Macduff J. then quoted from *McGillivray on Insurance Law* as reflecting his Lordship's own view:

"It is sometimes necessary to decide, in the context of fiscal or regulatory legislation, whether a contract containing insurance and non-insurance elements should be classified wholly or partly as a contract of insurance. The inclusion of indemnity provisions within a contract, or the supply of services, neither makes the indemnifier an insurer, nor justifies describing the contract as wholly or partly one of insurance. Where a contract for sale, or for services, contains elements of insurance, it will be regarded as a contract of insurance only if, taking the contract as whole, it can be said to have as its principal object the provision of insurance." 49

Applying this reasoning, Macduff J. concluded that this, on any view, was a contract for the provision of legal services. The indemnity clause, whether looked at individually or as part of the contract, was a subsidiary part of the contract.

Sibthorpe in the Court of Appeal again saw the twin attacks of champerty and illegal insurance. As for champerty, an indemnity was not a share of the spoils and the scope of champerty would, contrary to the recent trend in case law, have to be enlarged to include prospective losses. The provision of such an indemnity also supported the public policy of access to justice:

"[T]here is attraction in the notion that an otherwise unobjectionable CFA with the indemnity should be valid, at least in small cases where After the Event ('ATE') insurance is unavailable or is prohibitively expensive …." 50

This is dangerously close to approving what is in effect unregulated insurance simply on the grounds that regulated insurance would be too expensive.

Two major bases are relied upon in dismissing the champerty argument. First, the court considered the legislative intervention into contingency fees as indicating a narrowing of the scope of champerty. Secondly:

"No case has been cited51 in which it has been held to be champertous for a person to agree to run the risk of a loss if the action in question fails, without enjoying any gain if the action succeeds."

The legislative intervention was in the form of s.58 Courts and Legal Services Act 1990. In the Access to Justice Act 1999, Parliament repealed s.58 of the 1990 Act and re-enacted it in different terms. As the court notes: ***J.B.L. 68***

"In particular, whereas there originally was nothing in the section which specifically outlawed conditional fee agreements which did not comply with the statutory limitations and conditions, the new subsection 58(1) expressly provided that any such agreement which did not comply with the requirements of section 58 'shall be unenforceable'." 52

This would seem the clearest indication that Parliament intended the terms upon which solicitors could enter into conditional fee agreements be strictly controlled. The court went on to confirm that s.58 did not make provision for an indemnity of the type being used. And yet the Court of Appeal arrives at the conclusion that the provision of the indemnity was not prohibited. The benign nature of the court's view of this arrangement is palpable and leads the court to find that the absence of reference to indemnities, either in the statute or the cases on champerty, must mean such arrangement are not subject to control.

Further evidence of a liberal view is provided for in the references to the decision in *Thai Trading v Taylor*.53 The Court of Appeal in *Thai Trading* had reached the conclusion that a solicitor was not prevented by champerty from entering into an agreement to "forgo part or all of his fee if he loses, provided that he does not recover more than his ordinary costs and disbursements if he wins".54 The significance of that decision was that the solicitor had not complied at all with the statutory requirements of the Courts and Legal Services Act 1990 —it was an agreement outside of the legislative approval. The Court in *Sibthorpe* accepts that *Thai Trading* was decided per incuriam following *Awwad v Geraghty* where the Court of Appeal took the view that the failure in *Thai Trading* to cite the House of Lords authority of *Swain v Law Society* meant that *Thai Trading* could not be relied upon.55 Nonetheless the Court of Appeal in *Sibthorpe* calls it into aid to support the view that the indemnity was not champertous, citing

Millet L.J.:

"It is understandable that a contingency fee which entitles the solicitor to a reward over and above his ordinary profit costs if he wins should be condemned as tending to corrupt the administration of justice. There is no reason to suppose that Lord Denning in *Trendtex [1980] 1 QB 629* or any of the members of the Court in *Wallersteiner (No 2) [1975] 1 QB 373* had in mind a contingency fee which entitles the solicitor to no more than his ordinary profit costs if he wins. These are subject to taxation and their only vice is that they are more than he will receive if he loses. Such a fee cannot sensibly be described as a 'division of the spoils'. The solicitor cannot obtain more than he would without the arrangement and risks obtaining less." 56

From that it is reasoned that the public policy against champerty requires the making of a profit above ordinary profit, and the provision of an indemnity to the client against adverse costs cannot be seen as anything other than a potential loss. This appears to be an endorsement of the outcome in *Thai Trading* such that failure to comply with s.58 Courts and Legal Services Act 1990 would not be fatal to the legality of a non-compliant CFA. It is difficult to see how reliance upon *Thai Trading* ***J.B.L. 69*** ***J.B.L. 69*** to support the indemnity in *Sibthorpe* can sit alongside continuing to reject *Thai Trading* for all other purposes on the basis that it was per incuriam. The High Court in *Golden Eye International Ltd v TelefOnica Ltd*57 has recently taken *Sibthorpe* to establish that agreements between those having conduct of litigation and the litigant are champertous per se if there is a division of the spoils. The contrary argument is that the phrase "division of the spoils" could be taken to include any agreement whereby a solicitor is paid only if the litigation succeeds and not be confined to agreements that provide for a greater than normal profit. It may be asked that if it is not the case that a simple CFA, with no success fee, is not champertous, and therefore illegal at common law, why was it necessary to legislate for their use?

The favourable treatment of champerty in *Sibthorpe* is reflected in the treatment of the insurance argument. In the Court of Appeal this formed technically an application to appeal a refusal of leave to appeal on this point. The court concluded that permission ought to be refused. The reasoning of Macduff J. was expressly approved and the point is dismissed in two paragraphs of the Court of Appeal's judgment.58

Third-party costs orders against solicitors

A further context where a solicitor indemnifies a client's costs is the ability of the court to make a third party costs order under s.51 Senior Courts Act 1980. A solicitor could carry the liability for disbursements in the event that the case fails, a position that existed in *Germany v Flatman*.59 There the High Court held the solicitors in such circumstances would become a funder and would have a liability for adverse costs. The subsequent decision in *Tinseltime Ltd v Roberts*60 doubted *Germany v Flatman*, holding that the funding of disbursements by a solicitor was insufficient reason to make a third-party costs order. If the solicitor is carrying the liability for disbursements if the case is unsuccessful, the only mechanism for reflecting that risk lies in increasing the percentage of the success fee.

Co-defendant's indemnity

Perhaps analogous to the arrangements in the above indemnity cases is the recent case of *Glenn Mulcaire v News Group Newspapers Ltd*.61 A contract of indemnity between a newspaper publisher and a private investigator formerly employed by it covered costs and damages arising from litigation to which they were joint defendants resulting from illegal phone tapping. The agreement was held not to be void as contrary to public policy or for any other reason. No argument was raised that the indemnity constituted a contract of insurance. Understandable though this arrangement may be, it does have the appearance of a *Sibthorpe* type of indemnity if not indeed a contract of insurance. ***J.B.L. 70***

The regulatory context

The concept of a contract of insurance runs throughout regulatory schemes which in the case of Financial Services Authority regulation can lead to criminal prosecution, and in the case of regulation of solicitors by the Solicitors Regulation Authority can lead to serious disciplinary consequences. It is not inconsequential therefore to consider the solicitor's indemnity cases in the light of these regulatory provisions, not least because a lack of definition must hinder regulation, and must hinder because of the doubt that results those who seek to make business decisions as to the terms on which they will be willing to offer legal services.

The FSA has statutory responsibility for the regulation of general insurance under the Financial Services and Markets Act 2000. The Act is not unusual62 in avoiding a definition of a contract of insurance. The equivalent statute in Australia for example contains no definition. The Insurance Act 1973 uses the phrase "contract of insurance" but leaves that phrase without definition. Section 3 provides:

"[*I*]*nsurance business* means the business of undertaking liability, by way of insurance (including reinsurance), in respect of any loss or damage, including liability to pay damages or compensation, contingent upon the happening of a specified event, and includes any business incidental to insurance business as so defined …."

Similarly the Insurance Contracts Act 1984 s.10 provides:

(1) "A reference in this Act to a contract of insurance includes a reference to a contract that would ordinarily be regarded as a contract of insurance although some of its provisions are not by way of insurance.

(1)

Relevant EU63 provisions also fail to define a contract of insurance.64 New Zealand does provide a statutory definition65 as follows:

"Insurance (Prudential Supervision) Act 201066

7 "Meaning of contract of insurance

(1) For the purposes of this Act, unless the context otherwise requires, contract of insurance—

(a) means a contract involving the transference of risk and under which a person (the insurer) agrees, in return for a premium, to pay to or for the account of another person (the policyholder) a sum of money or its equivalent, whether by way of ***J.B.L. 71*** indemnity or otherwise, on the happening of 1 or more uncertain events; and

(b) includes a contract of reinsurance.

The FSA provides the following guidance[67] as to what constitutes a contract of insurance:

"A contract in which a provider promises:

1) "in return for one or more payments

2) to pay money to a recipient

3) if a defined event happens

4) where it is uncertain the event will happen and

5) the event is adverse to the recipient.

The first of these factors is significant to the solicitor's indemnity cases and was evident in the decision of Macduff J. in *Sibthorpe*,[68] but does not feature in *Dix* or *Lewis* or in the brief treatment of the insurance point in the Court of Appeal in *Sibthorpe*. The question perhaps arises in any event as to whether the chance to earn fees under a CFA is a sufficient financial incentive to satisfy this first factor. The resulting access to justice benefit of the provision of an indemnity is relied upon in those cases that approved of the indemnities. None of the cases, however, considers the business incentive behind the indemnities. That incentive is likely to be a commercial calculation that without the indemnities the chance to earn fees (profit) will not arise.

Solicitors Regulation Authority (SRA)

Regulation of solicitors is undertaken by the SRA,[69] and in the context of

insurance the relevant provision is the Solicitors Financial Services (Scope) Rules 2001 which forms the basis of the delegated professional body (DPB) exemption system for insurance mediation activity for firms not themselves authorised and regulated by the FSA. Article 8 Solicitors' Financial Services (Scope) Rules 2001 provides as follows:

"[I]nsurance mediation activity means any of the following activities specified in the Regulated Activities Order which is carried on in relation to a contract of insurance or rights to or interests in a life policy:

(a) "dealing in investments as agent;

(b) arranging (bringing about) deals in investments;

(c) making arrangements with a view to transactions in investments;

(d) assisting in the administration and performance of a contract of insurance;

(e) advising on investments;

(f) agreeing to carry on a regulated activity in (a) to (e) above. ***J.B.L. 72**

It follows that had the activity in *Sibthorpe* been classified as a contract of insurance that activity would not have come within the DPB exemption. As with the Mediation Directive[70] there is no definition of contract of insurance in the Solicitors Financial Services (Scope) Rules 2001 which are intended to comply with the Directive.

The third-party context

The Third Parties (Rights Against Insurers) Act 1930 [71] has as its purpose the provision to third parties of a ring-fenced insurance fund protected from the insolvency of the insured. By s.1, where under any contract of insurance a person is insured against liabilities to third parties which he may incur, then in the event of insolvency of the insured his rights against the insurer under the contract in respect of the liability shall, notwithstanding anything in any Act or rule of law to the contrary, be transferred to and vest in the third party to whom the liability was so incurred. Doubt as to application of the Act to legal expenses insurance in *Tarbuck v Avon Plc*[72] was perhaps removed by the decision in *Re OT Computers Ltd (In Administration)*[73] which decided that voluntary contractual[74] liabilities are covered by the 1930 Act. Clarity is intended to be given to that point at least by the Third Parties (Rights Against Insurers) Act 2010 [75] s.16, which provides that it is irrelevant whether or not the liability of the insured is or was incurred voluntarily. In *Persimmon Homes Ltd v Great Lakes Reinsurance (UK) Plc*,[76] a claim was brought under the Third Parties (Rights Against Insurers) Act 1930 where an

insured under an ATE policy had become insolvent. The Third Parties (Rights Against Insurers) Act 2010 will replace the 1930 Act and one of the intended changes is to now expressly include insurance of voluntarily incurred liabilities (such as legal expenses). The point was not taken in *Persimmon Homes*, possibly on the basis that *Re OT Computers*77 means that a challenge to coverage for legal expenses insurance would fail even under the 1930 Act. If so, then s.16 of the 2010 Act will only reflect current practice, if and when the Act is commenced. As it was, in *Persimmon Homes* the insurer avoided the policy on grounds of misrepresentation. It goes without saying that neither of these Acts provides any definition of a contract of insurance. The arrangements approved of in *Sibthorpe* would not fall under the Act if it can be assumed that a different answer would not be given to the question of whether the arrangements were insurance for the purposes of the Act. While legal expenses insurance is usually seen perhaps in terms of protecting the insured against pecuniary loss, the 1930 Act does provide another context in which to consider *Sibthorpe* and a reason to consider the interests of third-party defendants. There can be little doubt that the arrangement in *Sibthorpe* would not be enforceable by third-party defendant to an insolvent claimant under the 1930 Act.78

The context of reform

The Jackson reforms

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 contains provisions that will implement the report of *Sir Rupert Jackson, Review of Civil Litigation Costs: Final Report*.79 The two major reforms relevant to *Sibthorpe* are the removal of recoverable success fees and ATE premiums. The Courts and Legal Services Act 1990 s.58 is amended to provide that a costs order may not include a success fee and may not include an insurance premium other than one permitted by regulations.80 The adverse costs risk in personal injury and clinical negligence cases will be reduced by a system of qualified one way costs shifting81 under which a claimant in such cases will not ordinarily be liable for adverse costs should they lose. Such claimants will, however, be subject to the risk of adverse costs under CPR 36 in respect of failing to beat offers to settle and they will continue to risk paying own disbursements if they lose or abandon the claim.82 Outside personal injury and clinical negligence, the adverse costs risk will remain as it now is. The place of *Sibthorpe* indemnities in this new landscape is set to become far larger than it currently is.

The approval in *Sibthorpe* of solicitors providing clients with indemnities against adverse costs can be seen as encouragement to do so. This fits well with the underlying policy of the Jackson reforms to the civil justice system which is to shift the costs burden of the dysfunctional83 civil justice system away from defendants. That burden can only be shifted to claimants or their solicitor since the effect of the reforms will be to remove ATE insurance from the marketplace.84

Alternative business structures

A further context for considering the impact of *Sibthorpe* is the liberalisation of the ownership of solicitors' practices introduced under the Legal Services Act 2007. The Act in this respect came into force on October 6, 2011. Applications to the SRA as an authorising body commenced in January 2012. The combination ***J.B.L. 74*** of the Jackson reforms that threaten existing business models, *Sibthorpe* unregulated contracts of indemnity that encourages risk taking and alternative business structures under the 2007 Act provides a heady mixture. The prospect of profit driven responses raises the question of whether the ethical[85] basis for the new landscape has been given any or sufficient attention.

Insurance law reform

The reform of insurance law in England and Wales and Scotland has been the subject of considerable scrutiny by the respective Law Commissions[86] for those countries, but the matter of a definition of contract of insurance has not been included. The work on the illegality defence has some resonance with the public policy issues being worked out in the three solicitor indemnity cases and does raise the question of the move away from illegality with which the liberal view of champerty taken in *Sibthorpe* can be seen to be in sympathy. Nonetheless, the major issue of the definition of a contract of insurance and its significance to regulation,[87] client protection and third-party interests has not been the focus of the reform agenda.

Digital Satellite—a conclusion?

A significantly contrasting attitude to that shown in *Sibthorpe* can be detected in the more recent (and differently constituted) Court of Appeal decision in *Re Digital Satellite Warranty Cover Ltd*,[88] where a contract to provide repair and replacement of satellite television equipment coupled with an indemnity for accidental damage caused to the equipment was held to be in its entirety a contract of insurance.[89] The proceedings were brought by the FSA. A press release from the FSA following the decision of the Court of Appeal gives a clear indication that the regulator is intent on widening its regulatory remit:

"[W]e are aware of other firms who offer similar insurance products to DSWC, Satellite and NDSWS — but not just satellite equipment. We are also seeing cover for white goods, home entertainment equipment, electricity, plumbing and boiler problems. Indeed, we are aware of other firms who offer similar insurance products to DSWC, Satellite and NDSWS — but not just satellite ***J.B.L. 75*** equipment. We are also seeing cover for white goods, home entertainment equipment, electricity, plumbing and boiler problems." [90]

The decision of the Court of Appeal rests on what might be seen as a hostile interpretation of statutory provisions leading to the conclusion that the entire contract was financial loss insurance. The replacement of television equipment, albeit a replacement of physical property, and indeed a repair service to that equipment were nonetheless insuring against the pecuniary loss that such replacement or repair would involve for the customer. Given that stance perhaps it is not surprising that the judgment makes no reference to any argument that the indemnity for

damage caused to the equipment was collateral to the main purpose of the contract and consequently not insurance.

The court held that First Council Directive 73/23991 as amended by Directive 84/641 dealt with the harmonisation or at least the co-ordination of the regulation of direct insurance. Directive 73/239 as amended by Directive 84/64192 was to be regarded as laying down a minimum regulatory framework which did not exclude the right of national governments to extend regulation to a wider class of benefits in kind insurance.93 The risk covered by a contract providing for the repair and replacement of equipment and one which provided an indemnity for the costs involved is essentially the same.94

It is submitted that a less liberal and benign view of the *Sibthorpe* indemnity could have arrived at the conclusion that the indemnity was for the costs involved in bringing litigation.

Finally it can at least be asked (even if no answer is available) whether, first, third-party funding95 (TPF) and, secondly, CFAs, are contracts of insurance. TPF refers to the provision of direct funding of litigation provided to the litigant by a third party whose business is to invest in litigation. It was held in *Arkin v Borchard Lines Ltd*96 that such a funder, who finances part of a claimant's costs of litigation, should be potentially liable for the costs of the opposing party to the extent of the funding provided. Such liability can be directly pursued by an opposing party by seeking a cost order under the Civil Procedure Rules, and it is not based therefore on the terms of the contract between the funder and the litigant. It is also the case that the litigant would have a primary and independent liability for those costs such that it may only be the opponent who could trigger the funder's liability.

As for CFAs, the question again can be asked, if not answered, as to whether by taking on a risk on behalf of the client as to the client's pecuniary risk in bringing litigation the contract amounts to a contract of insurance. If a *Sibthorpe* indemnity is added to the CFA it becomes more difficult to escape the conclusion that, ***J.B.L. 76*** notwithstanding the absence of a definition of a contract of insurance in English law, that this is indeed insurance.

David Chalk

J.B.L. 2013, 1, 59-76

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1. Often referred to as "no win no fee" agreements.

2. CFAs were introduced by a combination of Courts and Legal Services Act 1990 s.27 and the Conditional Fee Agreements Order 1995 (SI 1995/1674). The Order came into force on July 5, 1995.

3. Courts and Legal Services Act 1990 s.58A(6) provides for a costs order to include a success fee; Access to Justice Act 1999 s.29 provides for a costs order to include an insurance premium. Both provisions came into force on

April 1, 2000.

4. Two schemes that became the focus of media attention were the original Claims Direct and The Accident Group (TAG) see *S. Yarrow, "Conditional Fees" in H.L. MacQueen (ed.), The Settlement of Legal Disputes, David Hume Institute (Edinburgh: Edinburgh University Press, 2003)*.

5. *Sibthorpe v Southwark LBC [2011] EWCA Civ 25; [2011] 1 W.L.R. 2111 (Sibthorpe)*.

6. See text to fn.20 below.

7. See for example *Gloucestershire CC v Evans [2008] EWCA Civ 21; [2008] 1 W.L.R. 1883*.

8. A solicitor's indemnity of the Pt 36 risk in conjunction with the CFA's provision as to own costs where a Pt 36 offer is not beaten are complex and represent a significant risk to the solicitor even though the case wins.

9. R. Merkin, "Tort, Insurance and Ideology: Further Thoughts" (2012) 75 M.L.R. 301, 302.

10. Before the event (BTE) and after the event (ATE); see *Sir Rupert Jackson, Review of Civil Litigation Costs: Preliminary Report Volume One (The Stationery Office, May 2009) (Jackson Preliminary Report), Vol.1, pp.20–21*.

11. The phenomenon of important legal rights and obligations depending upon a central but undefined contract is well known in employment law: G. Cavalier and R. Upex, "The concept of employment contract in European Union private law" (2006) 55 I.C.L.Q. 587

12. Contracts of indemnity have attracted their own case law recognition, for example in *Seaton v Heath;Seaton v Burnand [1899] 1 Q.B. 782 CA*; *Davys v Buswell [1913] 2 K.B. 47 CA*; *Phoenix General Insurance Co of Greece SA v Halvanon Insurance Co Ltd [1987] 2 W.L.R. 512 CA (Civ Div)*; *Feasey v Sun Life Assurance Co of Canada;Steamship Mutual Underwriting Association (Bermuda) Ltd v Feasey [2003] 2 All E.R. (Comm) 587 CA (Civ Div)*. The question of how such classification of a contract might differ from or be exclusive of contracts of insurance has not arisen but has been discussed in the context of New Zealand: S. Sinclair, "The Difference Between a Guarantee and an Indemnity" (1988–91) 6 Auckland U.L. Rev. 414. See also on contracts of indemnity G. Swaby and P. Richards, "Insurance reforms: rebalancing the kilter?" [2011] J.B.L. 535.

13. The difference between a contract of guarantee and a contract of insurance is not a new question: M. Blair, "The Conversion of Guarantee Contracts" (1966) 29 M.L.R. 522. For the purposes of this discussion the significant factor is that a guarantee is a contract with the creditor agreeing to discharge the obligation of a third-party debtor rather than a contract of indemnity where the agreement is with the debtor to indemnify the indebtedness to a third-party creditor.

14. The decision in *Sibthorpe* may be seen as sitting uncomfortably with the later decision of the Court of Appeal in *Re Digital Satellite Warranty Cover Ltd [2011] EWHC 122 (Ch)* (*Digital*) [see text to fn. 89 below.]

15. See section "Solicitors Regulation Authority (SRA)" below.

16. See above fn.8.

17. *Thai Trading Co (A Firm) v Taylor [1998] Q.B. 781 CA (Civ Div)*.

18. Legal Aid, Sentencing and Punishment of Offenders Act 2012 and the

. implementation of the report of *Sir Rupert Jackson, Review of Civil Litigation Costs: Final Report (The Stationery Office, December 2009) (Jackson Final Report)*.

19. Assurance Act of 1601 (43 Eliz. c.12).

20. The *Jackson Final Report (December 2009)* is expected to be implemented by changes to the Civil Procedure Rules in April 2013. In personal injury claims a new concept of qualified one way costs shifting is proposed. The effect is to remove the loser pays rule other than in specified circumstances (yet to be settled). This proposal enables abolition of recoverability of insurance premiums and with it the need for (and availability of) insurance policies. See section The context of reform and text to fn. 80.

21. *Jackson Preliminary Report (May 2009), Vol.1, pp.20–21*.

22. Counsel are also permitted by the same statutory provisions to enter into CFAs.

23. Contrast "before the event" legal expenses insurance which has been put in place before the happening of the event that gives rise to the litigation.

24. *Jackson Preliminary Report (December 2009), pp.151–174*. See also *M.J. Cook, Cook on Costs 2012 (London: LexisNexis Butterworths. 2011)*; *D. Chalk, Risk Assessment in Litigation (London: Butterworths, 2001)*.

25. See *Cook on Costs 2012 (2011), para.43.11*.

26. *Cook on Costs 2012 (2011), para.43.12*.

27. From April 1, 2000. By the Access to Justice Act 1999 s.27 an amendment to the Courts and Legal Services Act 1990 s.58 made provision for recovery of success fees.

28. *Callery v Gray [2001] EWCA Civ 1246; [2001] 1 W.L.R. 2142*.

29. *Callery v Gray [2001] EWCA Civ 1246; [2001] 1 W.L.R. 2142* at [59].

30. *RSA test cases [2005] EWHC 90003* (Costs).

31. *Dix v Townend [2008] EWHC 90117* (Costs)—a decision of Deputy Master Williams in what was then the Supreme Court Costs Office (SCCO), now the Senior Courts Costs Office.

32. That was the outcome in *Dix*.

33. *R. (on the application of Factortame) v Transport Secretary (No.8) [2002] EWCA Civ 932; [2003] Q.B. 381*, Lord Phillips M.R. at [76].

34. *Dix [2008] EWHC 90117* (Costs) at [71].

35. Article 4 of the Order provides as follows: "(1) The following provisions of this Part specify kinds of activity for the purposes of section 22 of the Act (and accordingly any activity of one of those kinds, which is carried on by way of business, and relates to an investment of a kind specified by any provision of Part III and applicable to that activity, is a regulated activity for

the purposes of the Act)."

36. *Dix [2008] EWHC 90117* (Costs) at [103].

37. *Dix [2008] EWHC 90117* (Costs) at [118].

38. *Murray Lewis v Tennants Distribution Ltd [2010] EWHC 90161* (Costs)—a decision of Master O'Hare, Costs Judge, in the SCCO.

39. Argument on insurance was due to be heard at a subsequent hearing but was never heard owing to the same issues being considered in the *Sibthorpe* case (*[2011] EWCA Civ 25; [2011] 1 W.L.R. 2111*, and see further below).

40. *Dix [2008] EWHC 90117* (Costs) at [20].

41. *Swain v Law Society [1983] 1 A.C. 598 HL*; *Awwad v Geraghty [2001] Q.B. 570 CA (Civ Div)*.

42. The breach of r.15 (costs advice) in *Garbutt v Edwards [2005] EWCA Civ 1206; [2006] 1 W.L.R. 2907* was held by the Court of Appeal to not render the solicitor/client contract illegal. Although the Practice Rules had statutory effect this particular rule was not mandatory and there were disciplinary sanctions in place.

43. *Sibthorpe [2011] EWCA Civ 25; [2011] 1 W.L.R. 2111*.

44. *Sibthorpe [2011] EWCA Civ 25; [2011] 1 W.L.R. 2111*.

45. See above fn.8.

46. *Sibthorpe v Southwark LBC [2010] EWHC B1 (QB); [2010] 4 Costs L.R. 526*, Macduff J.

47. *Callery [2001] EWCA Civ 1246; [2001] 1 W.L.R. 2142*.

48. *Callery [2001] EWCA Civ 1246; [2001] 1 W.L.R. 2142* at [38].

49. *Sibthorpe [2010] EWHC B1 (QB); [2010] 4 Costs L.R. 526* at [45]. *McGillivray on Insurance Law, 10th rev. edn, edited by N.Legh-Jones (London: Sweet and Maxwell, 2002), para.1–8*. This same paragraph was relied upon in the decision in *Dix [2008] EWHC 90117* (Costs).

50. *Sibthorpe [2011] EWCA Civ 25; [2011] 1 W.L.R. 2111* at [48] (Lord Neuberger M.R.).

51. *Dix* (in which the CFA was held to be contrary to public policy because of the indemnity) was cited to the Court of Appeal in argument but is not referred to in the judgment. *Dix* is referred to in the judgment of Macduff J. in the High Court.

52. *Sibthorpe [2011] EWCA Civ 25; [2011] 1 W.L.R. 2111* at [25].

53. *Thai Trading [1998] Q.B. 781*.

54. *Thai Trading [1998] Q.B. 781* at 790 (Millett L.J.).

.

55. *Awwad [2001] Q.B. 570*.

56. *Thai Trading [1998] Q.B. 781* at 788 (Millett L.J.).

57. *Golden Eye International Ltd v TelefOnica Ltd [2012] EWHC 723 (Ch)*.

58. *Sibthorpe [2011] EWCA Civ 25; [2011] 1 W.L.R. 2111* at [58]–[59].

59. *Germany v Flatman [2011] EWHC 2945 (QB); [2012] 2 Costs L.R. 271*.

60. *Tinseltime Ltd v Roberts [2012] EWHC 2628 (TCC); (2012) 162 N.L.J. 1290*.

61. *Glenn Mulcaire v News Group Newspapers Ltd [2011] EWHC 3469 (Ch); [2012] Ch. 435*.

62. A fuller comparison is provided by *J. Burling and K. Lazarus, Research Handbook on International insurance law and regulation (London: Edward Elgar Publishing, 2012)*.

63. As to the EU aim of a single market in insurance services see G. Rühl, "Common Law, Civil Law, and the Single European Market for Insurances" (2006) 55 I.C.L.Q. 879.

64. The Insurance Mediation Directive (2002/92) and the Legal Expenses Insurance Directive (87/334).

65. The Insurance Law Reform Act 1977 again uses the phrase "contract of insurance" throughout but does not define it.

66. The ultimate purpose of the Insurance (Prudential Supervision) Act 2010 is regulation. By s.15 (not in force) persons that carry on insurance business in New Zealand must be licensed and a person who carries on insurance business in New Zealand without holding a licence commits an offence.

67. *FSA, Perimeter Guidance Manual 6.3.4*.

68. *Sibthorpe [2010] EWHC B1 (QB); [2010] 4 Costs L.R. 526*.

69. Solicitors who engage in quasi insurance solutions to these client needs are at risk of contravention of the professional rules—see for example Solicitors Disciplinary Tribunal Case reference: 10731-2011 — G.H.R. Morgan, http://www.solicitorstribunal.org.uk/Content/documents/10731.2011.Morgan.pdf [Accessed October 18, 2012].

70. Insurance Mediation Directive (2002/92).

71. The 1930 Act was considered under a joint review by the Law Commission (England and Wales) and the Scottish Law Commission. A joint consultation paper defining certain issues was published in 1998: *Third Parties (Rights Against Insurers) Act 1930: A joint consultation paper*. The eventual result is the Third Parties (Rights Against Insurers) Act 2010.

72. *Tarbuck v Avon Plc [2001] 2 All E.R. 503 QBD*.

73. *Re OT Computers Ltd (In Administration) [2004] EWCA Civ 653; [2004] Ch. 317*. See J. Hjalmarsson, "Third parties in from the cold"(2004) 4(10) S.T.L. 2004 (on *Re OT Computers (In Administration)*).

74. *Tarbuck* concerned BTE insurance where at least part of the insurance cover is for own legal costs which will have been incurred by contract between the insured and a solicitor.

75. The 2010 Act has not been brought into force.

76. *Persimmon Homes Ltd v Great Lakes Reinsurance (UK) Plc [2010] EWHC 1705 (Comm); [2010] All E.R. (D) 114 (Jul)*.

77. *Re OT Computers [2004] EWCA Civ 653; [2004] Ch. 317*.

78. Irrespective of the insolvency of the claimant the question could arise as to whether a third-party defendant could enforce a *Sibthorpe* indemnity via the Contracts (Third Party Rights) Act 1999 which does not exclude contracts of indemnity (or indeed of insurance) from its scope.

79. *Jackson, Review of Civil Litigation Costs: Final Report (December 2009)*.

80. It is expected that regulations relating to premiums will permit a limited recovery of premium in clinical negligence claims in respect of cover for expert reports and other disbursements only.

81. This concept is expected to be introduced by changes to the Civil Procedure Rules. There is no reference to this reversal of the current costs assumption of loser pays in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 because that assumption is contained in the Civil Procedure Rules and not in statute.

82. See written ministerial statement, *July 17, 2012, "Ministry of Justice Implementation of Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012: Civil Litigation Funding and Costs"*, http://www.parliament.uk/documents/commons-vote-office/July_2012/17-07-12/18-Justice-LegalAidAct.pdf [Accessed October 18, 2012].

83. A. Zuckerman, "The Jackson Final Report on Costs—Plastering the Cracks to Shore Up a Dysfunctional System" (2010) 29 C.J.Q. 263.

84. R. Merkin, "Tort, Insurance and Ideology: Further Thoughts" (2012) 75 M.L.R. 301, 302.

85. R. Moorhead, "Filthy lucre: lawyers' fees and lawyers' ethics—what is wrong with informed consent?" (2011) 31 L.S. 345; M. Zander, "Zander on Moorhead on Costs" (2011) 161 N.L.J. 1350.

86. *Law Commission Consultation Paper No.201: Insurance Contract Law: Post Contract Duties and other Issues (December 2011)*; *Law Commission Consultation Paper No.189: The Illegality Defence*; *Law Commission Issues Paper 4: Insurable Interest (January 2008)*. In the Republic of Ireland the Law Reform Commission consultation paper Insurance Contracts (LRC CP 65 — 2011) similarly does not consider the question of the definition of a contract of insurance.

87. The question of whether the absence of a definition ought to be the subject of review was raised but with mixed response at a seminar in 2006: *"Reform of Insurance Contract Law — are there problems with English insurance contract law? If so, what areas should be the subject of reform?"* Report of a joint seminar held by the British Insurance Law Association and the Law Commission on January 19, 2006,

http://www.docstoc.com/docs/26272841/REFORM-OF-INSURANCE-CONTRACT-LAW# [Accessed October 18, 2012].

88. *Re Digital Satellite Warranty Cover Ltd [2011] EWCA Civ 1413; [2012] Bus. L.R. 990*. Permission to Appeal was granted by the Supreme Court on March 28, 2012: *In the matter of Digital Satellite Warranty Cover Ltd (Appellant) v Financial Services Authority (Respondent) UKSC 2012/0003*. A two-day hearing is listed to commence on December 10, 2012: see http://www.supremecourt.gov.uk/current-cases/CCCaseDetails/case_2012_0003.html [Accessed October 18, 2012].

89. *Sibthorpe* was not cited to the court and is not referred to in the judgment.

90. FSA/PN/103/2011, November 29, 2011.

91. First Council Directive 73/239 on the co-ordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance [1973] OJ L228/3–19.

92. Directive 84/641 amending, particularly as regards tourist assistance, the First Directive (73/239) on the co-ordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance [1984] OJ L339/21–25.

93. *Re Digital Satellite [2011] EWCA Civ 1413; [2012] Bus. L.R. 990* at [62].

94. *Re Digital Satellite [2011] EWCA Civ 1413; [2012] Bus. L.R. 990* at [63].

95. *C. Hodges, J. Peysner and A. Nurse, "Litigation funding: Status and Issues", Centre for Socio-Legal Studies, Oxford and University of Lincoln*, http://www.csls.ox.ac.uk/documents/ReportonLitigationFunding.pdf [Accessed October 18, 2012].

96. *Arkin v Borchard Lines Ltd [2005] EWCA Civ 655; [2005] 1 W.L.R. 3055*.

APPENDIX TWO

Risk Assessment in Litigation
Conditional Fee Agreements, Insurance and Funding

Supplement

Callery v Gray
Sarwar v Alam

David J Chalk
Principal Lecturer, Anglia Polytechnic University
Consultant Head of Risk Assessment at Litigation Protection Ltd

Butterworths
LexisNexis™

Preface

The need for a supplement to the main work after such a short time arises from two decisions in the Court of Appeal dealing with crucial aspects of the funding of litigation by CFA and insurance. The two test cases, *Callery v Gray* and *Sarwar v Alam*, have produced guidance which is likely to be used in the great majority of personal litigation. In particular very specific guidance is given in *Sarwar* as to how a solicitor should investigate pre-existing insurance.

The test cases have come about as a result of challenges being brought by the defendant insurance companies to the new funding arrangements. Although it has been decided to issue this supplement now, it is by no means possible to say that the dust has now settled and that there will be no more important decisions of the Court of Appeal. The supplement seeks to extract from the judgments the practical guidance, explain their context and provide useable strategies to deal with the increasingly complex area of litigation funding.

As at 4 December 2001, the House of Lords has granted provisional leave to appeal the Court's decision in *Callery*, pending objections from the respondents (original claimants). Leave has been sought to appeal on a number of issues but of particular importance are:

1. The liability of a defendant to pay an insurance premium when the defendant has been afforded no opportunity to respond to the claim.
2. The recovery of premium in respect of own costs.
3. The range up to 20% for success fees in RTA personal injury cases.

There are also test cases pending in respect of a major claims management scheme and other test cases seem likely on the issue of the Consumer Credit Act both with regard to funding insurance premiums and with regard to the use of CFAs.

This level of uncertainty as to the future is likely to lead to delay in the progress of new and existing cases and in the settlement of costs. It is to be hoped that if an appeal is heard in *Callery* explicit guidance will be forthcoming as to the effect of the judgment on cases where funding decisions had to be taken before the judgment was available, guidance which was not given by the Court of Appeal. It is submitted that whilst guidance from the courts as to the future practices to be followed is important, any argument that that guidance should be applied retrospectively places an undue burden on those who have had to apply the new law in the absence of guidance other than that which can be extracted from Government policy.

As with the production of the main work I am indebted to the publishing and editorial team at Butterworths for the dedication they have shown in producing the supplement.

The law is stated as at 10 December 2001

CONTENTS

A Callery v Gray

Reasonableness of Success Fees and the recoverability of After the Event insurance premiums

A.1 The Court of Appeal considered a number of issues in *Callery v Gray*[1] and *Callery v Gray (No 2)*[2]. The facts were as follows. The claimant was a passenger in a vehicle which was struck side-on by the defendant's vehicle. The claimant's solicitors acted on a CFA with a 40% success fee (plus 20% for delay). The claimant took out after the event insurance. Both the CFA and the insurance were arranged before any letter was sent to the defendant. The case settled without issue of proceedings and with the defendant agreeing to pay reasonable costs. The parties failed to agree the level of costs and the claimant issued costs only proceedings. The district judge allowed both the 40% success fee and the premium (£350).

1 [2001] EWCA Civ 1117, [2001] 3 All ER 833 (17 July 2001).

2 [2001] EWCA Civ 1246, [2001] 4 All ER 1 (31 July 2001).

A.2 The following issues were addressed—

1 Does s 29 of the Access to Justice Act 1999 (AJA 1999) apply to costs only proceedings?

2 Is it reasonable to take out a CFA with success fee and insurance before contacting the other side in the dispute?

3 What principles govern the reasonableness of success fees?

4 What principles govern the level of insurance premiums?

5 Is AJA 1999, s 29 restricted to that part of an insurance premium which relates to the risk of adverse costs?

A.3 The following answers were given—

1 AJA 1999, s 29 does apply to costs only proceedings.

2 It is reasonable to enter into a CFA with success fee and to purchase ATE insurance at the outset.

3 Three methods [see paras **A.26–A.42** below].

4 The focus must be on the benefits purchased and not the use made of the premium by the insurer.

5 Elements of own costs are permitted in a recoverable premium.

A.4 Strictly, all of the issues referred to above are confined to Road Traffic Accident (RTA) cases giving rise to a personal injury claim. However, with Issue 1, the type of claim cannot be relevant to the decision, which must therefore be applicable to all types of claim. Issue 2 has been decided in the

context of RTA cases but there is no basis for arguing that a different decision would be reached outside of RTA cases. On Issue 3, the approach to success fees in terms of principle might well be used outside of RTA cases but the specific figures will differ. It is with Issue 4, regarding the level of premium, that the decision will be restricted to RTA CFA insurance. No guidance is given for both sides' insurance or for any insurance outside of RTA cases or even for policies where there has been no differentiation between RTA cases and other personal injury matters.

SUCCESS FEES (JUDGMENT OF 17 JULY 2001)

Type A A single standard success fee set at the outset

A.5 In RTA cases, the court concluded that the figure should not exceed 20%. This is based upon the overall success rate being in the region of 90%. No guidance was given outside of RTA cases.

Type B Non-standard single success fee

A.6 Where there are, at the outset, factors suggesting the case may fail, then a higher success fee than the standard 20% is reasonable, but it is likely that the figure cannot be set until a response is obtained from the opponent.

Type C The two-stage success fee

A.7 Where it is expected that the case will not settle until at least the end of the protocol period, it would be reasonable to set a higher success fee but provide for a significant rebate if the case unexpectedly settles within the protocol period. The court gave no guidance as to how the two figures should be calculated but it is envisaged that both figures will be set at the outset. The court gave the example of a 100% fee rebated to 5% in the event of settlement within the protocol period.

INSURANCE PREMIUMS (JUDGMENT OF 31 JULY 2001)

A.8 Section 29 of AJA 1999 should be interpreted so as to treat the words 'insurance against the risk of incurring a costs liability' as meaning 'insurance against the risk of incurring a costs liability that cannot be passed on to the opposing party.[1]'

1 See *Callery v Gray (No 2)* [2001] EWCA Civ 1246, [2001] 4 All ER 1 at paras [59]–[60].

A.9 Accordingly, cover which included some own costs liabilities was within AJA 1999, s 29. The court left open however the extent of own costs cover which a court might consider to be reasonable. In *Callery*[1] itself the cover was for own disbursements (not including counsel), premium and unrecovered premium. The court considered the last item to be insignificant in terms of the attributable premium in this case. The recoverability of a premium for a full both sides' costs policy was left open.

1 [2001] EWCA Civ 1117, [2001] 3 All ER 833.

A.10 Reference is made to collateral benefits provided by insurers. No such benefits were given in the case and the court thus left open the question of the recovery of premium which pays for such benefits. Examples of collateral benefits are case handling and negotiation and practical assistance such as counselling or arranging business matters.

On the facts, the court held that the premium of £350 was reasonable.

ANALYSIS

Issue 1 Does s 29 of The Access to Justice Act 1999 apply to costs only proceedings?

A.11 Section 29 of AJA 1999 provides:

> 'Where in any proceedings a costs order is made in favour of any party who has taken out an insurance policy against the risk of incurring a liability in those proceedings, the costs payable to him may, subject in the case of court proceedings to rules of court, include costs in respect of the premium of the policy.'

A.12 Held:

> '(i) When the 1999 Act was enacted the only circumstances in which a Claimant could obtain a costs order from the Court was by seeking such an order in the substantive action in relation to which the costs had been incurred.
>
> (ii) Where an action is commenced and a costs order is then obtained, the costs awarded will include costs reasonably incurred before the action started, such as costs incurred in complying with a pre-action protocol.
>
> (iii) Section 29 of the Access to Justice Act enables the Claimant to include in such costs the premium for an insurance policy against liability for costs in the substantive proceedings, even where that policy was taken out in contemplation of those proceedings before they were commenced.
>
> (iv) The "proceedings" referred to in section 29 are therefore proceedings advancing a claim for substantive relief.
>
> (v) CPR 44.12A is a new procedure introduced to enable "pre-action" costs to be recovered where an action has been settled before substantive proceedings have been commenced. One object of this Rule is to facilitate the settlement of proceedings where there is agreement upon all issues save the assessment of the pre-action costs incurred.
>
> (vi) CPR 44.12A states that it sets out a procedure under which the Court can make a costs order where:
>
> "(a) the parties to a dispute have reached an agreement on all issues (including which party is to pay the costs)

which is made or confirmed in writing; but

(b) they have failed to agree the amount of those costs";

(vii) *The meaning to be accorded to "the costs" and "those costs" in the Rule is 'the costs which would have been recoverable in the proceedings had the proceedings been commenced'. There is no other meaning that can sensibly be given to these words.* [emphasis added]

(viii) By reason of section 29 of the 1999 Act, such costs may include the costs of an ATE insurance premium taken out in contemplation of the commencement of substantive proceedings.[1]'

1 [2001] EWCA Civ 1117, [2001] 3 All ER 833 at para [54].

A.13 It is point (vii) which encapsulates the decision that s 29 does give jurisdiction to a court to include the cost of an insurance premium in an order for costs made at costs only proceedings. Arguing *from* the CPR to the statute must surely be questionable. If s 29 is the necessary authority then it must contain the means of applying to costs only proceedings. It had been argued that s 29 was not worded in such a way as to apply to costs only proceedings. The court's decision, based as it is on the CPR, side-steps the statutory interpretation point.

Issue 2 Is it reasonable to take out a CFA with success fee and insurance before contacting the other side in the dispute?

A.14 The defendant insurers argued that the only reasonable time to enter into a CFA with a success fee and to purchase ATE insurance was at the conclusion of the protocol period (three months) by which time the issues are clearer and the position of the defendant is known, at least on whether liability is being contested.

A.15 The opposing argument was that it was reasonable to offer a client legal services from day one and to tell him that there would be no costs to pay 'whatever the outcome.[1]'

1 [2001] EWCA Civ 1117, [2001] 3 All ER 833 at para [90].

A.16 Held:

'*In these circumstances*, we consider that, from the viewpoint of both the claimant and his solicitor, it will *normally* be reasonable for a CFA to be concluded and ATE cover taken out on the occasion that the claimant first *instructs his solicitors*. What we have to decide is whether, having regard to the statutory provisions, (i) the cost of the success fee and (ii) the ATE premium, when incurred at that early stage, can be recovered.[1]' [emphasis added]

'For these reasons we have concluded that where, *at the outset*, a reasonable uplift is agreed and ATE insurance at a reasonable premium is taken out, the costs of each are recoverable from the

defendant in the event that the claim succeeds, or is settled on terms that the defendant pay the claimant's costs.[2]' [emphasis added]

1 [2001] EWCA Civ 1117, [2001] 3 All ER 833 at para [91].

2 [2001] EWCA Civ 1117, [2001] 3 All ER 833 at para [100].

A.17 The four points emphasised above:

IN THESE CIRCUMSTANCES

This appears to be a reference back to para [90] which outlined the respondents' argument as being related to 'modest claims in respect of a road traffic accident, where liability is unlikely to be in issue and the question of damages is unlikely to create complexities.'

A.18 The difficulty is in taking this as a statement of principle and testing the extent to which it can apply outside RTA cases or in RTA cases where it is thought likely that damages will prove difficult. It is unclear whether the court is really suggesting that it is not reasonable to enter into a CFA at the outset unless the case is clearly without difficulty – if that is the result then it will be argued that access to justice has been severely restricted. The appellants had argued that because at the outset nothing can really be known about the risks in a case no success fee could be justified.

A.19 The court rejected the argument that a success fee cannot be set where there is no knowledge of the opponent's case. In RTA cases, it was possible for the court to estimate the overall likely success rates of such cases and to be safe in an assumption that the vast majority can be described as 'straightforward'. For an application of this approach to clinical negligence see *Bensusan v Freedman*[1] below at para **A.53**. The 20% figure arrived at by the court does not reflect the particular risks and facts of an individual case but rather an accepted estimate that overall success rates are 90%.

1 [2001] All ER (D) 212, SCCO Case No 0104797 of 2001.

A.20 Outside of RTA cases, the major issue is that even were it possible to arrive at generally acceptable classification of case types, no statistics are available as to success rates. *Bensusan v Freedman*[1] provides a good example of the difficulty of classifying cases as types. The label of clinical negligence covers a vast range of cases lacking the degree of similarity which the vast number of road traffic cases will share. Outside of road traffic therefore, there must be a subjective assessment of risk expressed in numerical terms. Either such a success fee can be set at the outset with no knowledge of the opponent's case or it can be set at a later stage. In *Bensusan* the success fee was set at the outset in a clinical negligence case, the dispute being the level of the success fee rather than when it was set. Where the case falls into a category other than road traffic, where success rates are lower, it is arguable that the same approach can reasonably be taken and that a success fee from day one is reasonable in principle (subject to level).

1 [2001] All ER (D) 212, SCCO Case No 0104797 of 2001.

A.21 *Callery v Gray*

A.21 In clinical negligence cases, generally practitioners do not offer a CFA from day one – such cases require a level of investigation before such a decision is made. In commercial cases it is not common for a CFA to be offered at the early stage. This of course raises the difficult question of whether, when a CFA is eventually entered into, it can be retrospective to cover the work done before it was made[1].

1 See Chalk *Risk Assessment in Litigation: Conditional Fee Agreements, Insurance and Funding* (Butterworths 2001), Chapter 8, para 8.4.

NORMALLY

A.22 A qualification such as this could be dismissed as being no more than the cautious terms expected from a judgment. In theory it perhaps permits a decision that in a particular case the circumstances were so far from 'normal' that it is not reasonable to enter into any funding arrangement at the outset. It will remain to be seen whether any such cases ever arise.

INSTRUCTS HIS SOLICITORS

A.23 It is essential to keep in mind that this is a judgment and not a statute. The clear intention here was to indicate that entering into a funding arrangement at the outset would be reasonable. It is submitted that no argument can be erected here that a funding arrangement made before first instructions would be unreasonable.

AT THE OUTSET

A.24 These words are also a clear indication that the issue being addressed is prematurity and that the judgment is that it is reasonable to enter into a funding arrangement at the very outset. The court was not addressed on the question of whether a solicitor must be involved at the outset and the judgment does not attempt to address that issue.

Issue 3 What principles govern the reasonableness of success fees?

A.25 The court's conclusions give rise to at least three approaches to success fees; in particular arose the concept of a two-stage success fee. Set out below are three types of success fee which can be discerned from the judgment.

Type A – a single success fee set at the outset

A.26 The judgment addresses the question of the success rate in RTA cases which, it had been argued by the appellants, was as high as 98%. The court took the view that in the absence of reliable data it was not possible to be precise about the level of success:

> 'In the circumstances we think that it is reasonable to proceed on the premise that at least 90% of such claims will settle without the need for proceedings, or will succeed after proceedings have been commenced.'[1]

1 [2001] EWCA Civ 1117, [2001] 3 All ER 833 at para [103].

A.27 The court then reached a conclusion on the appropriate success fee:

> 'After careful consideration and having reflected on the reasoning in the judgments below in the two appeals, we have concluded that, where a CFA is agreed at the outset in such cases, 20% is the maximum uplift that can reasonably be agreed.[1]'

1 [2001] EWCA Civ 1117, [2001] 3 All ER 833 at para [104].

A.28 This does not state that 20% is to be the success fee in all RTA cases. However, on the facts of *Callery v Gray*[1], the court permitted a success fee of 20%. It is widely accepted that the facts were not difficult. The view that 90% of such cases succeed, translates into a success fee of 11% (assuming costs in won cases are at the same level as those in lost cases)[2]. There is, however, no reasoning given for the 20% figure.

1 [2001] EWCA Civ 1117, [2001] 3 All ER 833.

2 See Chalk *Risk Assessment in Litigation: Conditional Fee Agreements, Insurance and Funding* (Butterworths 2001) Chapter 22.

A.29 Some indication as to what lies behind the court's decision can be found in earlier paragraphs of the judgment:

> 'The solicitor carrying on litigation business on a large scale may have regard to similar considerations. He may seek to ensure that the uplifts agreed result in a reasonable return overall, having regard to his experience of the work done and the likelihood of success or failure of the particular class of litigation. This will not mean that he does not consider the merits of the particular case, where he is aware of facts which call for individual assessment. But there may be categories of claim that have, so far as he is aware, sufficient common characteristics to justify *a standard approach to determining uplift*.[1]' (emphasis added)

1 [2001] EWCA Civ 1117, [2001] 3 All ER 833 at para [83].

A.30

> 'We are in this case concerned with such a category of claim: claims for the consequences of a motor accident where, on the claimant's account of the accident, the solicitor reasonably concludes that the claim has every prospect of an early settlement as to both liability and quantum. At that stage the risk assessment that results in the determination of the uplift is likely to turn, not on peculiar features of the instant case – for there will be none – but on his experience that in a small minority of such cases, when the claim is pursued some unforeseen circumstance results in the ultimate failure or abandonment of the claim.[1]'

1 [2001] EWCA Civ 1117, [2001] 3 All ER 833 at para [84].

A.31 This is the strongest indication given by the court that a success fee is not intended to reflect only the individual case but is to reflect the overall experience in a raft of like cases. In road traffic cases it appears

uncontroversial to assume a 90% success rate taking into account abandoned cases. Outside this category arriving at an overall figure will be far more difficult and contentious.

A.32 The court appears to accept that there are difficulties where a firm is not conducting a large number of like cases:

> 'These comments are not, of course, directed to solicitors who choose, as they reasonably may, to defer agreeing a CFA until they know more about the claim than they have learned from the claimant. Nor are they apposite in the case of a solicitor who does not specialise in litigation, but who on occasion conducts a piece of litigation for a client. Such a solicitor is likely to decide on the uplift by asking himself what reward he requires to induce him to take the risk that he may not recover his fees from the case in question.'[1]

1 [2001] EWCA Civ 1117, [2001] 3 All ER 833 at para [85].

A.33 The small firm could justify a higher success fee because that firm will not carry sufficient cases in volume terms to enable the 20% figure to provide safety. This leads to the argument on behalf of defendants that they ought not to be paying a premium because the claimant has chosen a solicitor who does not carry a high volume of similar cases. The defendant argument must be that a claimant who wishes to use a low volume firm is free to do so but must carry the extra success fee themselves. As the law stands at present that is not possible unless the court grants express permission to the firm to recover part of a success fee, disallowed as against the opponent. It could also be argued that a figure of 20% contains a sufficient cushion, albeit only in road traffic cases, to cover firms whose caseloads perform below the national average and that to permit such firms to build in still more would be wrong.

A.34 Two further questions then arise with respect to setting a single success fee at the outset: (i) how is the success fee to be set within the limit of 20% and (ii) can a single success fee ever be set at the outset which exceeds 20%?

A.35 (i) The above two passages suggest that there will be a standard success fee for RTA cases run in large numbers. That success fee reflects the expectation of high levels of success with a small minority providing difficulties. Such reasoning does suggest that 20% would be justified in all RTA cases run on this basis – no guidance has been given as to what would be a reasonable lower figure.

A.36 (ii) The reference to large-scale litigation practices[1] is difficult. The case of *Callery*[2] did involve such a firm of solicitors. However, it is abundantly clear that many firms of smaller scale require guidance. It could be argued that where the firm is not involved on a large scale the success fee ought to be higher. The extent to which that suggestion bears analysis is unclear given the court has given no indication of how reasonableness could be arrived at in such cases. The theory is that those dealing on a large scale are likely to perform at or near the national average (itself an unknown and thus justifying a 20% success fee). The question

then is whether a firm not in that category can justify a higher success fee on the basis that its own share of the litigation may perform at below the national average. In theory, if all non large-scale firms are put together they will cover all cases so that the performance will even itself out. To permit an individual firm to set a success fee on the assumption that it might fall into a category of below national average will of course inflate success fees, since all small firms will do this. It may be accepted that in road traffic cases a 20% success fee is sufficient, irrespective of the volume of cases run, because the overall high success rates leave only a small margin for under-performance. In other categories the margin for under-performance will be far greater.

1 [2001] EWCA Civ 1117, [2001] 3 All ER 833 at para [83].

2 [2001] EWCA Civ 1117, [2001] 3 All ER 833.

A.37 The stark question which must arise is: Can a small firm justify, for example, a 30% uplift?

> 'We wish to emphasise two matters in respect of this conclusion. The first* is that it assumes that there is no special feature that raises apprehension that the claim may not prove to be sound. Where there is such a feature, the appropriate uplift will be higher, *but it may not be reasonable to attempt to assess that uplift until further information about the defendant's response is to hand.*[1]' [emphasis added]

This suggests rising above 20% in RTA cases where individual features of the case justify caution. The emphasised words seem however to depart from the recognition that success fees will be set at the outset and require delay until at least some response is received from the other side. If the court meant to indicate that a departure from the statistical norm (which in RTA cases is unknown) can only be justified if time has been provided for a response from the opponent then, with respect, that could have been made explicit. The extent to which it is in fact practicable to delay offering a CFA to a client must be seriously questioned by those who practice in the field of personal injury.

*(The second matter is that data is not yet available and therefore the court may wish to review its decision once data is available).

1 [2001] EWCA Civ 1117, [2001] 3 All ER 833 at para [104].

A.38 The facts of *Russell v Pal Pak Corrugated*[1] (heard on appeal with *Callery*[2]) provide an important illustration. The claimant's case was that the defendant reversed his car into the claimant's stationery car and the claimant suffered a whiplash injury. The county court judge reduced the success fee from 30% to 20% even though he himself recognised that the defendant might well say that it was the claimant who drove into him. These may well be facts which would suggest a two-stage success fee – see para **A.42** below. (In the Court of Appeal there was no cross-appeal to increase the 20% thus it remained at that figure). It can be argued that such facts do on their face suggest that the case is of a high risk and not an easy case at all given that it must depend upon the oral evidence of the two drivers. On that basis it must be reasonable

to set a success fee reflecting the risk at the time it is set. The court has accepted that entering into a CFA with as success fee at the outset is reasonable.

1 [2001] EWCA Civ 1117, [2001] 3 All ER 833.

2 [2001] EWCA Civ 1117, [2001] 3 All ER 833.

A.39 The part of para [104] emphasised in the above extract presents a difficulty for the concept of a single success fee set at the outset and indeed the concept of the two stage success fee also set at the outset. It is submitted, however, that it is possible to assess such *risks* at the outset. What is missing is not the risk but the knowledge of the actual position. The essence of risk assessment is in identifying the existence of a risk – risk being created by uncertainty. An assumption that the client is content to wait for a CFA until more information is known would be misconceived in many cases. Nonetheless it seems that the court does not accept this view hence the complexity of three methods of arriving at a success fee.

A.40 The reference[1] for large-scale litigation firms to factors indicating that a particular case is unsound poses severe problems. It has to be assumed that the guidance will in practice apply to all cases which a firm chooses to take on. The justification for the 20% success fee in RTA cases is that on average some 90% succeed and, therefore, all cases which would appear likely to settle run a 10% risk that they will not. On a large scale, therefore, within the caseload of the firm there will be some cases representing the 10% which are not successful. To permit the firm to identify such cases and enhance the success fee above 20% is to refute the justification for the 20% success fee in the first place. In other words, the 10% of unsound cases are already allowed for in the 20% figure. The judgment seems to permit this departure from its own principles.

1 [2001] EWCA Civ 1117, [2001] 3 All ER 833 at para [104].

Type B – single-stage – non standard

A.41 Departing from the 20% standard for RTA cases (and any standard arrived at for other classes) must involve an analysis of the individual case[1]. Paragraph [104] of the judgment (above) seems to take the view that such analysis must await a response from the other side. The difficulty here is that the case already suggests a difficulty but the court expects the client to accept a refusal to enter into a CFA until more is known and it expects the solicitor to run the case until such time as setting a success fee is acceptable. This seemingly ignores the amount of work involved in investigation. It effectively requires a pro-bono approach for an indeterminate time. It seems unlikely that cases of this type will obtain access to justice since it requires the Type A fee or a high degree of speculation, with no success fee for an important part of the work.

1 See Chalk *Risk Assessment in Litigation: Conditional Fee Agreements, Insurance and Funding* (Butterworths 2001).

Type C – the two-stage success fee

A.42 Much argument was heard during the appeal hearing about the

two-stage success fee approach as opposed to a single success fee. The single success fee approach is based upon the litigator either not having much information about the individual case and therefore having to set the success fee on the basis of national average figures (Type A) or waiting until a response is received (Type B). The two-stage success fee is intended to rebate the success fee if the case settles within the protocol period:

> 'A success fee can be agreed which assumes the case will not settle, at least until after the end of the protocol period, if at all, but which is subject to a rebate if it does in fact settle before the end of that period. Thus, by way of example, the uplift might be agreed at 100%, subject to a reduction to 5% should the claim settle before the end of the protocol period.[1]'

1 [2001] EWCA Civ 1117, [2001] 3 All ER 833 at para [107].

A.43 It is important to note that this is a single success fee, set at the outset and does not set two success fees[1]. The result, therefore, is that if the case settles within the protocol period the rebated success fee is applied to all of the work done from the beginning.

1 See Type D at para **A.51** below.

A.44 There are significant difficulties in applying the two-stage success fee. Both stages of the success fee must still be set at the outset when little information will be available upon which to determine the first stage fee:

> 'A two-stage success fee of the type we propose, agreed at the outset, would be likely to be agreed before the merits of the individual claim were apparent.[1]'

1 [2001] EWCA Civ 1117, [2001] 3 All ER 833 at para [115].

A.45 In a straightforward RTA case such as in *Callery v Gray*[1] it would seem 20% would be the figure for the first stage until better data becomes available but that is the fee chargeable in a single success fee approach. To argue that a figure greater than 20% is justified, even one less than the court's extreme example of 100%, is to suggest that the 20% figure does not allow for those cases which will fail[2]. Outside of RTA cases there is no guidance and arguably even less data than in RTA cases upon which to reach a figure.

1 [2001] EWCA Civ 1117, [2001] 3 All ER 833.

2 See above para **A.41**.

A.46 The second stage fee pre-supposes an offer of settlement has been accepted within the protocol period and, therefore, although there was a risk that the case would not settle, in fact it has settled. The court is currently viewing the two-stage success fee as an option. Were it to become a requirement the principle of the CPR of not applying hindsight would have to be removed[1]. It is intended to be a rebated fee based on the first stage fee. The court gave its justification for the second stage:

> 'If a claim is settled before the end of the protocol period, it would be

reasonable that there should still be a success fee payable since:

(i) The lawyers are entitled to be compensated for accepting a retainer on a no-fee-no-win basis with the inevitable risk that this involves, however small this risk may appear in many cases.

(ii) An appropriate success fee would contribute towards those cases where no fees are payable because they end unsuccessfully.[2]

1 See CPR 11.7 and see Chalk *Risk Assessment in Litigation: Conditional Fee Agreements, Insurance and Funding* (Butterworths 2001), Chapter 8 especially para **8.51**.

2 [2001] EWCA Civ 1117, [2001] 3 All ER 833 at para [110].

A.47 It is very difficult to see upon what basis such a fee is to be calculated. For a case which does not settle in the protocol period the success fee is the higher of the two and would be applied to all of the work done in the case, the lower fee being now irrelevant. Where the case does settle however, it is the lower fee which applies to all the work done. It is difficult to see why a firm would take on a high risk case on the basis that if it unexpectedly settles early the compensation for that initial risk should be reduced to a very small figure. Again, the court has marginalised difficult cases in this method by the imposition of hindsight. A modest rebate of a success fee for settlement within the protocol might provide access to justice for those with meritorious but difficult claims whilst also encouraging early settlement where such is appropriate. If the two figures in the two-stage success fee can be arranged in less stark contrast to the example given by the court, then this approach may come to be adopted.

A.48 A firm assessing the risk involved in setting a two-stage success fee will immediately recognise that a very low second stage fee will never compensate for cases which lose. The reduced success fee which applies to all the work in the case (and not just work done post acceptance of settlement offer) confuses the purpose of a success fee. All cases which settle begin as cases where there is a risk that they will not settle – a risk which differs from case to case but not over a class of cases. This is one aspect of *Callery v Gray*[1] which is not addressed in any depth in the judgment. Is the success fee designed to compensate for the cases which lose or is it designed only to reflect the individual case merits? When success fees were to be paid by the individual client there was a necessary link between the individual merits and the success fee. Now that success fees are payable by the defendant can it be argued and is it the unsaid assumption of the court, that the success fee should reflect the national average of all cases of the type into which the individual case falls. Certainly in RTA cases the judgment sets the limit at 20% on the basis of national averages.

1 [2001] EWCA Civ 1117, [2001] 3 All ER 833.

A.49 Success fees are by definition only paid in cases which succeed and where on an individual basis there is no loss in need of compensation. In

cases which lose, the firm not only fails to recover a success fee, it receives no fee at all. These losses are what is risked in any case run on a CFA and it must be the case therefore that it is the purpose of the success fee to compensate for the actual losses. A firm which never loses a CFA case would of course not need any success fee beyond that for which the client is responsible (delay in payment).

A.50 The two-stage success fee is put forward in terms of cases which are not expected to settle but do settle within the protocol period. The court gives no guidance as to what is meant by settled and consideration needs to be given to the likelihood that there will be a significant percentage of cases, even in road traffic, where liability, causation, quantum and costs are agreed before the conclusion of the protocol period. As was seen on the facts of *Callery*[1], a defendant's letter may be ambiguous in its terms, stating something such as liability but not causation is accepted.

1 [2001] EWCA Civ 1117, [2001] 3 All ER 833.

Type D – Two or more success fees

A.51 The court did not address the use of different success fees for different stages of a case:

> 'We consider there is no need to consider the question of the legality of a two-stage success fee as we see no difficulty in having a single success fee calculated by reference to an upper level and a reduced level in specified circumstances.[1]'

1 [2001] EWCA Civ 1117, [2001] 3 All ER 833 at para [114].

A.52 Some doubt appears to have been raised however, as to whether the statutory scheme for CFAs permits the use of multiple success fees. Section 58(4) of the CLSA 1990[1] requires a CFA which has a success fee to state the percentage increase. No other statutory provision appears relevant. Regulation 6 of the CFA Regulations 2000[2] requires a repeat compliance with regs 2, 3, 4 and 5 only where a CFA is amended to cover further proceedings or parts of them. A CFA which provides for different success fees for different stages of the proceedings would not fall within the amendments covered by reg 6. There remains the question of whether a CFA which states a success fee for some stages of the case, but then provides that for later stages it will be reviewed, has complied with s 58(4) of the CLSA 1990. It could be argued that it fails to specify the percentage increase. The alternative would be to have separate CFAs for separate stages. Such an approach would involve a repeat of all of the information requirements of the CFA Regulations. It would also require notice to be given to the opponent since this would be a new CFA. There appears to be no difficulty, however, where a CFA specifies at the outset one success fee for work before a particular stage is reached, for example, admission on liability, and a different specified success fee thereafter. This part of the base costs would attract one success fee and the rest a different success fee. It would be possible to set a succession of success fees. There is nothing to preclude subsequent success fees being set a rates higher than preceding success

fees. Where success fees are to be varied it will be necessary to obtain the client's consent and to ensure compliance with Practice Rule 15.

1 See Chalk *Risk Assessment in Litigation: Conditional Fee Agreements, Insurance and Funding* (Butterworths 2001) para **4.16**.

2 SI 2000/692.

Success fees outside of road traffic – Bensusan v Freedman[1]

A.53 An early application of the principles laid down in *Callery*[2] is found in the decision of Senior Costs Judge Hurst, in *Bensusan v Freedman*[3]. The claimant, an elderly female, swallowed a dental reamer during treatment by a dentist. The claimant suffered shock and anxiety as a result of the incident but surgery was not required. The claimant was represented by specialist dental negligence lawyers on a CFA carrying a 50% success fee. The claimant lived in Kent and her solicitors in Cheshire. She was represented by a grade one fee earner. The claim was settled for £2,000 plus costs five weeks after the claim letter. The costs were not agreed and the claimant issued Part 8 costs only proceedings.

1 [2001] All ER (D) 212, SCCO Case No 0104797 of 2001.

2 [2001] EWCA Civ 1117, [2001] 3 All ER 833.

3 [2001] All ER (D) 212, SCCO Case No 0104797 of 2001.

A.54 It was held that it was not reasonable to instruct solicitors in Cheshire nor specialist dental negligence lawyers in such a case[1]. It was not a case warranting a grade 1 fee earner. The case could have been handled by a grade 2 fee earner. The success fee was not appropriate for a straightforward clinical negligence case such as this. The success fee was reduced from 50% to 20%.

1 On this issue see para **B.36** below.

A.55 The court accepted the following factors as contributing to higher risks in this field of litigation but said that none applied in this particular case:

1 Professional judgments are less certain in the field of medicine and dentistry than in other fields;

2 Defences are more rigorously pursued by medical defence organisations;

3 The costs of investigating clinical negligence claims can be extremely high as liability, causation and quantum issues are usually complicated and expert evidence is required in support of such issues.

A.56 At para [36] reference is made to success rates in clinical negligence:

> '…judicial notice can be taken of the fact that, of clinical negligence cases which go to trial, the success rate is modest and it may well be that, viewed across the whole spectrum of clinical negligence cases,

> the success rate is 50%. I have insufficient data to make such a finding.[1]'

1 [2001] All ER (D) 212, SCCO Case No 0104797 of 2001 at para [36].

A.57 The decision, in effect, grades cases within clinical negligence and even within the field of dentistry so that success fees cannot enable a practice to reflect its workload overall. The danger of this approach for access to justice is that without stronger cases supporting weaker cases solicitors will be unable to take on cases which are difficult but meritorious or carry high cost risks.

A.58 Extensive quotations are taken from the Court of Appeal in *Callery v Gray*[1] in considering two issues; firstly the use of a two-stage success fee and secondly the Court of Appeal's decision that 20% was appropriate in road traffic cases.

1 [2001] EWCA Civ 1117, [2001] 3 All ER 833.

A.59 The Court of Appeal raised the concept of a two-stage success fee[1] having been first raised by Lord Woolf LCJ during argument.

At para [115] Lord Woolf concludes the consideration of the two stage success fee:

> 'While the exercise involved in determining a reasonable two-stage fee would be more complex, we suggest that, once the necessary data is available, consideration will need to be given to the question whether, where fees are agreed at the outset, the requirement to act reasonably mandates the agreement of a two-stage success fee.'

The Senior Costs Judge concludes '…it is clear from that judgment that in future, the requirement to act reasonably will mean that the solicitors will have to consider using a two-stage success fee[2]'.

1 [2001] EWCA Civ 1117, [2001] 3 All ER 833 at paras [106]–[115].

2 [2001] All ER (D) 212, SCCO Case No 0104797 of 2001 at para [30].

A.60 It is difficult to see, with the current lack of reliable data even in road traffic cases, that the time when this approach to success fees could be seriously applied is anything more than distant. Instructive, however, are the words of para [115] which precede the above extract:

> 'A two-stage success fee of the type we propose, agreed at the outset, would be likely to be agreed before the merits of the individual claim were apparent. Thus, the uplift would be unlikely to reflect precisely the likelihood of failure of any individual claim that did not settle. The determination of the reasonable figures for the full uplift and the rebated uplift would have to be based on overall claims experience, with the proportion of contested cases which succeed, and the costs earned from such cases, being particularly significant.[1]'

It is respectfully submitted that these words clearly indicate that the success

fee is to be set to reflect an overall claims experience and not to reflect the individual risk elements. The decision in *Bensusan*[2] rejects any such approach.

1 [2001] EWCA Civ 1117, [2001] 3 All ER 833 at para [115].

2 [2001] All ER (D) 212, SCCO Case No 0104797 of 2001.

A.61 The decision of the Senior Costs Judge refers to the 20% success fee allowed in *Callery v Gray*[1]:

> 'In arriving at the figure of 20% in the case of straightforward road traffic accidents, the Court of Appeal was influenced by figures put forward by APIL which demonstrated that even where there was a high level of success it was necessary to recover success fees of 20% or above in order to break even. Bearing in mind that the Court of Appeal decision was specifically limited to straightforward claims in road traffic accident cases and the terms in which it is couched, it can form no more than a starting point for deciding the appropriate success fee in this case.[2]'

1 [2001] EWCA Civ 1117, [2001] 3 All ER 833.

2 [2001] All ER (D) 212, SCCO Case No 0104797 of 2001 at para [42].

A.62 The conclusion reached in *Bensusan*[1] is that because the case was at the lowest level of complexity a success fee of 20% was appropriate. It is difficult to see from where the figure of 20% is obtained. The Court of Appeal in *Callery*[2] arrived at its figure for road traffic on the basis of APIL figures. There is no reference in the decision in *Bensusan*[3] to any reliance upon equivalent figures for this class of case.

1 [2001] All ER (D) 212, SCCO Case No 0104797 of 2001.

2 [2001] EWCA Civ 1117, [2001] 3 All ER 833.

3 [2001] All ER (D) 212, SCCO Case No 0104797 of 2001.

A.63 Two further matters dealt with in *Bensusan*[1] were retrospectivity and the risk assessment of the claimant's solicitor. The Senior Costs Judge makes reference to ss 11.7 and 17.8(2) of the Costs Practice Direction (CPD):

11.7 (amount of costs)

> 'Subject to paragraph 17.8(2), when the court is considering the factors to be taken into account in assessing an additional liability, it will have regard to the facts and circumstances as they reasonably appeared to the solicitor or counsel when the funding arrangement was entered into and at the time of any variation of the agreement.[2]'

17.8(2) (costs only proceedings)

> 'In cases in which an additional liability is claimed the Costs Judge or District Judge should have regard to the time when and extent to which the claim has been settled and to the fact that the claim has been settled without the need to commence proceedings.[3]'

1 [2001] All ER (D) 212, SCCO Case No 0104797 of 2001.

2 CPD, s 11.7.

3 CPD, s 17.8(2).

A.64 These two provisions are inherently contradictory. The Senior Costs Judge summed up their combined effect as being:

> '...to prevent the costs officer from using hindsight in arriving at the appropriate success fee, and to prevent excessive claims for success fees in cases which settle without the need for proceedings when it was clear, or ought to have been clear from the outset, that the risk of having to commence proceedings was minimal.[1]'

1 [2001] All ER (D) 212, SCCO Case No 0104797 of 2001 at para [45].

A.65 There are dangers in determining, after a case has settled, how clear it was at the beginning that it would settle. Consideration will also have been given to the operation of CPR Pt 36. In *Bensusan*[1] the case settled after five weeks, a factor relied upon by the defendant in challenging the success fee.

1 [2001] All ER (D) 212, SCCO Case No 0104797 of 2001.

A.66 As to the claimant solicitor's risk assessment set out in the CFA, specific reasons for the 50% success fee relating to the facts of the individual case were stated as follows:

1 Contributory negligence by the patient's sudden movement.

2 A defence based upon reasonable steps to protect the airway.

A.67 The Senior Costs Judge records these reasons but there is no indication given as to how they relate, if at all, to the conclusion that the appropriate success fee was 20%. *Callery*[1] approves of the practice of entering into a CFA with a success fee at an early stage and before the response of the opponent can be judged. The CFA in *Bensusan*[2] was set at this early stage where a risk assessment necessarily has to consider what might be the response of the opponent.

1 [2001] EWCA Civ 1117, [2001] 3 All ER 833.

2 [2001] All ER (D) 212, SCCO Case No 0104797 of 2001.

A.68 The Court of Appeal in *Callery*[1] supports the view that success fees are intended to enable a range of cases to be taken on by enabling success fees to subsidise cases that fail. This is particularly clear from para [115] quoted above. Whilst the facts in *Bensusan*[2] can be accepted as being at the low end of risk and complexity, a success fee based only upon that factor will inevitably lead to the more risky cases being rejected and access to justice denied.

1 [2001] EWCA Civ 1117, [2001] 3 All ER 833.

2 [2001] All ER (D) 212, SCCO Case No 0104797 of 2001.

Callery v Gray (No 2) – What principles govern the level of recoverable insurance premiums? (Issue 4); Is section 29 restricted to that part of an insurance premium which relates to the risk of adverse costs? (Issue 5)

A.69 These issues were postponed by the court pending a report from Costs Judge Master O'Hare. The court was reconstituted for this with Lord Phillips MR and Brooke LJ and judgment was given on 31 July 2001[1]. Paragraph numbers are from that judgment given by Lord Phillips MR.

1 [2001] EWCA Civ 1246 [2001] 4 All ER 1.

A.70 The court decided that reasonableness was to be judged by the benefits obtained for the premium and not the use made of the premium by the insurer[1]. Section 29 refers to the benefit of insuring against a costs risk. As to whether s 29 could extend to other benefits the court regarded that question as arguable[2]. The reference to the use made of the premium by the insurer deals with and rejects arguments that the make-up of the premium ought to be examined.

1 [2001] EWCA Civ 1246 [2001] 4 All ER 1 at para [12].

2 [2001] EWCA Civ 1246 [2001] 4 All ER 1 at para [13].

A.71

> 'It is important in this context to draw a distinction between two separate matters. The first is the nature of the benefits to which the litigant is contractually entitled in exchange for the payment of the premium. This falls to be determined from the terms of the contract under which the premium is paid. Section 29 of the 1999 Act permits the recovery of a premium where this is payment for insurance against the risk of liability for costs. If payment of a so-called premium buys a contractual entitlement to other benefits it is, to say the least, arguable that the premium cannot, to that extent, be recovered under s 29. Thus the court has to consider the terms of the contract under which the premium is paid to see whether it is simply a contract of insurance against liability for costs or whether it is something other than, or additional to, that.'[1]

1 [2001] EWCA Civ 1246 [2001] 4 All ER 1 at para [12].

A.72

> 'The contractual benefits purchased by the premium must be distinguished from the use made by the insurer of the premium. An insurer will necessarily look to premium income to meet the costs of the business. The primary costs are likely to be those of meeting claims, but the costs will also include matters such as commissions, advertising and, indeed, refurbishing the insurer's premises. The court will not be directly concerned with how, or on what, the insurer spends the premium income. The court will, however, be concerned with the question of whether the premium is a reasonable price to pay for the benefits that it purchases. Ultimately, this should be a question to be

> considered having regard to experience, or evidence, of the market. If an insurer is conducting his business in a manner which incurs extravagant, extraneous or otherwise unnecessary expenditure, which has to be covered by the premiums, those premiums are likely to be uncompetitive. To pay such a premium where other more reasonable premiums are available may disentitle the litigant from making a full recovery of the costs of the premium.[1]'

1 [2001] EWCA Civ 1246 [2001] 4 All ER 1 at para [13].

A.73 It was further decided that where a premium is challenged it is for the ATE insurer to provide evidence that the premium is reasonable.

> 'In the meantime, where an insurance premium is challenged it must be open to the insurer, whose position is akin to a subrogated underwriter, to place evidence before the court in an attempt to demonstrate that the premium is reasonable having regard to the costs that have to be covered. Satellite litigation involving such an exercise is, however, unsatisfactory. The judge can only be expected to give broad consideration to such evidence, for it is not part of the function of a judge assessing costs to carry out an audit of an insurer's business.[1]'

1 [2001] EWCA Civ 1246 [2001] 4 All ER 1 at para [16].

A.74 This effectively puts the burden onto the insured who will either have already paid the premium or have a liability so to do. It may be that the court was influenced here by the terms of the particular policy which had been purchased, which provided that the premium would be rebated to the extent to which it had been found to be unreasonable. If this is the explanation it is regrettable that no recognition was made of the very few providers who include such terms in their policies. The court also rejected Master O'Hare's presumption that a premium is reasonable[1].

1 [2001] EWCA Civ 1246 [2001] 4 All ER 1 at para [69].

A.75 The court considered the extent of cover which a recoverable premium might obtain:

Adverse costs

A.76 The court set out a number of circumstances where a court order might be made (judgment for defendant; Part 36; claimant losing one or more issues; discretionary power). The policy in this case further provided cover where the parties agreed that the insured should pay costs. The court held that a premium in respect of each of these circumstances was recoverable under s 29.

Own costs

A.77 Paragraphs 34 to 62 of the judgment dealt with this issue. The court outlined the circumstances in which a litigant might be left to bear his own costs:

A.77 *Callery v Gray*

> 'A litigant may be left to bear his own costs in a number of different circumstances. The costs incurred may be excessive or otherwise unreasonable, so that they will in no circumstances be recoverable from the litigant's opponent. Reasonable costs will be recoverable only under a settlement agreement or an order of the Court. A litigant may fail to obtain a Court order for payment of costs for a number of reasons. His claim may fail, so that costs are ordered against him, rather than in his favour. He may fail on a particular issue at an interlocutory stage or at the final hearing and, in consequence, fail to obtain a costs order in relation to that issue. If he is successful the costs order made in his favour will not necessarily cover his solicitor and client costs.[1]'

1 [2001] EWCA Civ 1246 [2001] 4 All ER 1 at para [39].

A.78 Having reviewed material from the Lord Chancellor's Department consultation papers, the explanatory notes to the Access to Justice Bill and submissions as to the overall scheme, the court reached its conclusions on this issue by dealing with the relevant parts of the CPR and the CPD.

A.79 In particular reference is made to CPD, s 11.10 which provides in part:

> 'In deciding whether the cost of insurance cover is reasonable, relevant factors to be taken into account include:
>
> (1) where the insurance cover is not purchased in support of a conditional fee agreement with a success fee, how its cost compares with the likely cost of funding the case with a conditional fee agreement with a success fee and supporting insurance cover;'

A.80 The court reached the conclusion that own costs cover is within s 29:

> 'The provisions of Practice Direction 11.10 clearly anticipates that insurance cover that falls within the ambit of section 29 may provide alternative protection to that provided by a CFA coupled with insurance. Such cover will necessarily include own cost insurance. The Practice Direction cannot, of course, confer on the court a jurisdiction that falls outside that conferred by section 29. The question is whether section 29 can and should be interpreted so as to treat the words "insurance against the risk of incurring a costs liability" as meaning "insurance against the risk of incurring a costs liability that cannot be passed on to the opposing party".[1]'
>
> 'We have concluded that section 29 can and should be interpreted in this way. We believe that such an interpretation will do no more than give the words the meaning that would be attributed to them by the reasonable litigant. It will also give the words a meaning that accords with the legislative intention and with the overall scheme for the funding of legal costs.[2]'

1 [2001] EWCA Civ 1246 [2001] 4 All ER 1 at para [59].

2 [2001] EWCA Civ 1246 [2001] 4 All ER 1 at para [60].

A.81 Here again, however, the court restricted itself to the facts of the case and has left it open for challenges to be made on the degree of own costs cover granted by other cases:

> 'The circumstances in which and the terms on which own costs insurance will be reasonable, so that the whole premium can be recovered as costs, will have to be determined by the courts, when dealing with individual cases, assisted, if appropriate, by the Rules Committee.[1]'

1 [2001] EWCA Civ 1246 [2001] 4 All ER 1 at para [61].

A.82 This conclusion must however be set against the court's decision as to the meaning of s 29 in terms of the risk of being unable to pass a liability to an opposing party.

Premium cover

A.83 The policy in this case included a commonly provided cover for the premium itself in the event that the claim failed. The court concluded that as an item of own costs cover this was within s 29. The court here however expressly states that the level of premium charged for this part had to be reasonable. This item by item approach is not reflected in the rest of the judgment. It is submitted that given the court has decided that this benefit is within s 29 it is the overall cost of obtaining all of the s 29 benefits which should be considered rather than any attempt to apportion parts of premium to each or any benefit.

Deferred premium

A.84 The policy purchased in this case provided for the premium to be paid at the conclusion of the case. The issue of the cost within the premium representing a delay in payment was not raised in the appeal and the court therefore said that this issue would be addressed if and when it arose. The alternative method of funding premiums which many insurers provide is by way of a loan to the client. The interest on that loan would not be recoverable on the basis of the general principle of not inquiring into how a litigant has funded their costs – see *Hunt v RM Douglas (Roofing) Ltd*[1].

1 [1988] 3 LS Gaz R 33, CA.

Unrecovered premium/ring fencing of damages

A.85 Some policies give cover designed to protect damages from unrecovered costs and in particular from any unrecovered premium. The effect on the premium level in the case itself was regarded as minimal or non-existent. The cover there provided was limited to any unrecovered premium. This leaves therefore the question of recovery where the cover is greater, although the court did question whether it was the Lord Chancellor's intention that such cover would be paid for by an opponent:

> 'We have seen nothing to suggest that it was the intention that

> claimants should be entitled to pass on to defendants the cost of insuring against failure to be awarded costs on the ground that the costs had been unreasonably incurred or were otherwise objectionable.[1]'

1 [2001] EWCA Civ 1246 [2001] 4 All ER 1 at para [54].

Collateral benefits

A.86 The court here refers to benefits provided by the insurance other than cover for legal costs and at para [33] expressly leaves this question open. Master O'Hare's report gave examples of collateral benefits such as claims negotiation and handling, counselling and other practical help. On the facts of the case there were no collateral benefits given by the policy.

Both sides costs policies[1]

A.87 The court was not considering a policy which provided both sides' costs (BSI) other than the limited extent of own disbursements. There are passages in the judgment, however, which refer to the issues which will arise where the cover is for own costs in a fuller extent:

> 'Mr Callery's cover does not make it a condition of the recoverability of his disbursements in the event of the failure of his claim that these would have been recoverable had his claim succeeded. In the case of BSI this question is likely to be much more significant.[2]'

1 [2001] EWCA Civ 1246 [2001] 4 All ER 1 at paras [61], [41], [51], [54].

2 [2001] EWCA Civ 1246 [2001] 4 All ER 1 at para [41].

A.88 The point being made here is that where a policy provides cover for all of the insured's own costs in the event that the case fails, that cover may well extend to items which would not have been recovered had the claim succeeded. It will be a difficult exercise however to try to apportion premium to this hypothetical amount since the cover given will be in terms of an overall limit of indemnity.

The actual cost in Callery

A.89 The premium paid in the case was £350 plus tax. The court was asked by the appellant to reduce that figure to nearer to £160. The court held that the price paid was not manifestly disproportionate to the risk. The premium paid was not however the lowest available in the market:

> 'So far as alternatives are concerned, Mr Callery was able to choose, with the assistance of his solicitors, cover at a premium near the bottom of the range of what was available. The premium was one tailored to the risk and the cover was suitable for Mr Callery's needs. The policy terms also had the attractive feature that they gave his solicitors control over the conduct of the proceedings on his behalf, without any involvement by a claims manager until a settlement offer was made.[1]'

1 [2001] EWCA Civ 1246 [2001] 4 All ER 1 at para [70].

A.90 Having allowed this premium the court was clearly concerned for the future effect on premiums:

> 'Just as in the case of our decision on the CFA uplift, we should emphasise that this judgment should not be treated as determining once and for all that a premium of £350 is reasonable in a case such as this. As further information and experience about the market becomes available it will be possible to found conclusions as to whether premiums are reasonable on a sounder basis.[1]'

1 [2001] EWCA Civ 1246 [2001] 4 All ER 1 at para [71].

A.91 It will remain to be seen how coherent the market becomes in the future and what information about products and claims will be made available. Not all insurers will gather the same experience at the same time and they will not all review their products at the same time. This at the very least will make it difficult to take a snapshot of the market at any given time with a view to setting benchmarks.

MASTER O'HARE'S REPORT

Status of the Report[1]

A.92 The court annexed the Report to its judgment without approving the views expressed within the Report. The objective is to make it available to those who have to make decisions on recoverability in the future:

> 'His views may prove of assistance to those faced with the task of ruling on the recoverability of ATE premiums, but they cannot be treated as definitive.[2]'

1 [2001] EWCA Civ 1246 [2001] 4 All ER 1 at para [4].

2 [2001] EWCA Civ 1246 [2001] 4 All ER 1 at para [4].

Guidance for assessment

A.93 Set out on the following page in Table I is a summary of the Report's analysis of premiums based upon a list of benefits additional to adverse costs cover. Master O'Hare was giving guidance as to the percentage of premium which could be attributed to these items, information which will be needed only where on assessment it is considered that that part of the premium ought not to be recovered. The effect of the court's judgment on each item is therefore given since not all items can be treated in the same way as to recoverability.

A.94 Table II sets out Master O'Hare's guidance for the conduct of detailed assessments in RTA cases. Again the effect of the court's judgment is given alongside the Report's conclusions.

Table I — What does the premium cover?

A.95

Item	Court of Appeal recoverable*	Report
Own counsel's fees	Yes	Allow in full
Other disbursements	Yes	Allow in full
Cover for appeals	Not considered	Negligible
Costs of Part 36	Yes	Substantial but not quantified
Top up cover option	Not considered	Not quantified
Interest foregone on deferred premiums	No decision see para [65]**	Allow in full
Premium cover in event case loses	Yes	Allow in full
Unrecovered premium	Doubted see paras [54] and [62]	Not quantified
Claims record of solicitor	Not considered	Not quantified
Interest on disbursement loans if claim fails	Not considered	Consider: rate of interest, size of loan, likely durationof proceedings, risk of loss
Advice and assistance of claims managers	Arguably not, see paras [12] and [33]	Not quantified

* The Court's decision is as to recoverability and not the question of the cost of that cover which might be found nonetheless to be unreasonable.

** All paragraph numbers are references to the judgment of Lord Phillips MR at [2001] EWCA Civ 1246 [2001] 4 All ER 1.

Table II — Guidance for detailed assessment – RTA cases

A.96

	Guidance	Court of Appeal
(a)	No benchmarking - develop benchmarks through experience	
(b)	High limit of indemnity does not itself indicate unreasonable premium	
(c)	Block risk policies not unreasonable	May be difficult to justify – see para [23]
(d)	[rejected by court]	There is no presumption that the premium is reasonable
(e)	Allowed premium is total not the pure underwriting risk premium	Do not look to how the premium is used by the insurer.
(f)	Assessment fees and profit costs of complying with policy recoverable	Not considered
(g)	Receiving party need not have made the best choice - must be reasonable choice	Premium actually allowed was not lowest available.
(h)	Paying party to provide evidence from 'Litigation Funding' or similar source	ATE insurer to provide evidence of reasonableness – see para [16]
(i)	Can be reasonable to insure before sending letter to opponent Also reasonable to wait until defendant's reaction known	Yes Not considered
(j)	If premium at or above top of range of other policies - purchaser must explain	Not specifically addressed but judgment generally consistent
(k)	High cost premium easier to justify where high success fee has been allowed	Not considered
(l)	Consider reductions for irrecoverable elements [Table I]	See Table I
(m)	Value deductions by broad brush	Not considered

B Sarwar v Alam

The effect of Before the Event Insurance on recovery of After the Event Insurance premiums

B.1 The Court of Appeal in *Sarwar vAlam*[1] has given guidance to solicitors who need to address the insurance position of a client suing for damages for personal injury as a result of a road traffic accident. As with the earlier decision of the court in *Callery v Gray*[2] and *Callery v Gray (No 2)*[3], it is likely that the guidance will be influential in cases not arising from road traffic accidents although the court in all three judgments emphasises that cases outside of road traffic personal injury were not being considered.

1 [2001] 4 All ER 541.

2 [2001] EWCA Civ 1117, [2001] 3 All ER 833.

3 [2001] EWCA Civ 1246 [2001] 4 All ER 1.

B.2 *Sarwar*[1] was an appeal by the claimant from the decision of Judge Halbert at Chester County Court that an After the Event (ATE) insurance premium could not be recovered in costs against a losing opponent where a Before the Event (BTE) insurance policy was available , but the claimant's solicitor had not checked for its availability. The basis of that decision was that it was not reasonable to purchase an ATE policy without having checked the existence of BTE policies, including that of a defendant driver being sued by a passenger.

1 [2001] 4 All ER 541.

B.3 The Court of Appeal gives guidance for road traffic cases in general requiring inquiry into BTE, although this particular appeal on the facts succeeded on the basis that the BTE cover which had not been checked was contained in the defendant's own policy. The court held on the facts that it was not incumbent upon a claimant to use the defendant's policy. Accordingly the ATE premium was, on those facts, recoverable.

B.4 As a result of this decision it is now necessary for a solicitor, at least in road traffic personal injury matters where the value is not expected to reach £5,000, to make enquiry of the client as to BTE policies that the client or their partner in the household may have. In claims by passengers, consideration needs also to be given to any policy of the driver, although where that person is the defendant the BTE may be unsuitable. The court emphasised that whilst a 'treasure hunt' was not expected, proportionate enquiries ought to be made. The court does not address the effect on recovery of premium of wrong information; for example where the client wrongly believes they have no insurance.

B.5 The facts are as follows. The claimant lived in the same house as the defendant. The claimant was a passenger in the defendant's car when

the defendant drove his car out of a side road and onto a main road where he collided with another car. When asked by his solicitor, the claimant said that he did not have any insurance. An ATE policy was then taken out. The claim was settled without issue of proceedings. Part 8 costs only proceedings were issued upon the refusal of the defendant's insurer to pay the ATE premium. After the Part 8 proceedings had been issued the defendant's insurer disclosed the existence of the defendant's BTE policy which covered claims by passengers. The liability policy was with CIS and the add-on BTE with DAS.

B.6 The court held that the overriding principle is that the claimant should act in a manner that is reasonable. The availability of ATE cover at a modest premium will restrict the extent to which it will be reasonable to use a solicitor's time to investigate alternatives. In personal injury claims arising from road traffic accidents where the claim does not look as if it will exceed £5,000 and the claimant possesses BTE cover satisfactory to a claim of the size in question, the claimant ought to be referred to the BTE insurer. Even where the client has access to legal representation through a trade union there still needs to be a referral to the BTE insurer. Accordingly the solicitor ought to request the client to bring policy documents to the first interview. Motor, household and stand-alone policies need to be considered to include policies of the client and their spouse or partner living with them. It is not at present necessary to consider credit cards or charge cards. The solicitor should then read the policy documents to determine the suitability of the cover. In addition to BTE insurance, clients should be asked about employer and trade union cover.

B.7 In claims by passengers, the client should be asked to try to obtain a copy of the driver's motor policy where it is reasonably practicable to do so. If the driver's policy requires the policyholder's consent to use the BTE cover then the client should seek consent. If there is a reasonable possibility that the passenger is likely to blame the driver then a BTE policy of the type in this case need not be used. The policy in this case did not provide for a transparently independent organisation to handle the claim.

B.8 Claims of the size being dealt with here are not such that there must be a free choice of lawyer given to the client. The right of any citizen to be represented by solicitors of his or her choice may be cut down by circumstances. The circumstances include the fact that the cost of instructing a solicitor of the client's choice would be disproportionate to the value of the claim.

B.9 The court considered 5 main issues:

1 The level of inquiry about BTE cover.

2 The terms of the BTE policy in *Sarwar*[1].

3 Suitability of BTE cover.

4 Must BTE be used where it exists?

5 Freedom of choice of lawyer/use of panels.

1 [2001] 4 All ER 541.

1 The level of inquiry about BTE cover

Inquiry of the client

B.10 The court's approach to checking BTE cover begins at para [45] with the assumption that the client will be attending a face to face interview with the solicitor. In the context of road traffic personal injury claims that assumption would be wrong in a large number of cases. It is necessary to adapt the court's approach for clients who will be interviewed by telephone and who will not meet their solicitor:

> 'In our judgment, proper modern practice dictates that a solicitor should normally invite a client to bring to the first interview any relevant motor insurance policy, any household insurance policy and any stand-alone BTE insurance policy belonging to the client and/or any spouse or partner living in the same household as the client. It would seem desirable for solicitors to develop the practice of sending a standard form letter requesting a sight of these documents to the client in advance of the first interview. At the interview the solicitor will also ask the client, as required by paragraph 4(j)(iv) of the client care code (see para 14 above), whether his/her liability for costs may be paid by another person, for example an employer or trade union.[1]'

1 [2001] 4 All ER 541 at para [45].

B.11 The essence of the guidance is that proportionate and early inquiry should be made of the client. There seems nothing in principle that prevents adequate inquiry by telephone albeit that the costs in terms of time are likely to be significant if a questionnaire has to be administered by telephone. The following questionnaire is suitable for client use before first interview or administration by telephone:

B.12 *Sarwar v Alam*

Client Questionnaire

B.12 Please answer each question YES or NO or NOT KNOWN by putting a tick in the box next to each question

	Yes	No	Not Known
1 Do you, or a partner living with you, own your home (with or without a mortgage)?			
2 Have you, or a partner living with you, insured the contents of your home?			
3 Have you, or a partner living with you, purchased Legal Expenses insurance?			
4 Are you, or a partner living with you, employed?			
5 Are you, or a partner living with you, a member of a trade union?			
6 Were you driving a car when the accident occurred?			
7 If you were a passenger do you know the name of the driver of the car you were in?			
8 If you were a passenger, is the driver related to you?			
9 In your opinion was the accident the fault of your driver?			
10 Are you likely to be able to find any insurance policies that you have?			

Using the above questionnaire

B.13 The questionnaire is intended to enable a risk assessment to be made of the likelihood of a client having BTE cover. This approach avoids the assumption that a client will have accurate knowledge of their past and existing insurance cover. Questions 1–3 where answered YES indicate a likelihood that BTE will exist. Negative answers indicate a likely absence of BTE. Questions 6–9 indicate the suitability of BTE and deal particularly with passenger clients. Question 10 addresses the practical difficulty of asking a client to bring with them all policy documents. An accompanying letter should stress the importance of existing insurance cover and the need to provide the documents. In passenger cases the client should be asked to contact the driver to obtain a copy of the driver's policy. Questions 4 and 5 comply with the Client Care Code in exploring alternatives other than insurance.

The questions

B.14

1 YES = Likely to be buildings insurance which may have an add-on BTE cover (but may exclude road traffic claims.)

NO = No buildings insurance is likely to exist giving cover to the client.

2 YES = BTE may exist as an add-on to the contents policy (but may exclude road traffic claims.)

NO = Not a source for BTE

3 YES = This is specifically purchased as a stand-alone BTE policy.

NO = No stand-alone likely to exist.

4 YES = Possible that the employer provides BTE.

NO = Not a source of BTE

5 YES = May provide legal assistance though not BTE.

NO = Not a source of funding.

6 YES = Client ought to have liability insurance – it may include a BTE add-on.

NO = Client's own motor policy BTE add-on will not provide cover*.

7 YES = Client to request copy of driver's BTE policy and seek consent to use it.

NO = Unlikely to be cost effective to pursue this source.

8 YES = Potential conflict of interest may make this BTE unsuitable.

NO = No conflict of interest arising from family relationship.

9 YES = Likely conflict of interest may make this BTE unsuitable.

NO = Need to assess nonetheless the possibility that blame will eventually attach to own driver.

10 YES = Indicates information provided will be accurate.

NO = indicates that information will be incomplete and some unavailable.

* If the client was a passenger but had a motor policy of their own covering the driver as a named driver or where the policy covers all drivers, there may be BTE cover available to the client under such a policy. For example where a husband is driving his wife's car and the wife's policy covers the husband as a named driver, both are likely to be covered in any add-on BTE policy. If in such a case there were to be multiple claims, for example, husband, wife and other passenger, the situation becomes complex, certainly in terms of advice to the client as to the suitability of cover.

Likelihood of BTE existing

B.15 The Government's consultation paper, Access to Justice with Conditional Fees, March 1998, formed the basis for the Court of Appeal in *Callery v Gray*[1] accepting that 17 million people were purchasers of BTE cover by 1998:

> 'The Government is keen to encourage the wider use of legal expenses insurance more generally, both for before-the-event and after-the-event insurance. Many people have legal expenses insurance as part of other insurance polices they hold at premiums so small *that most do not realise they have cover* in the eventuality that they need to go to law. These policies have been available for over twenty years and over 17 million people are already covered by one of these policies. They usually cost between £4 and £20 a year. The Government wants to see a varied market for providing products to enable people to go to law if the need arises. The Government is therefore keen to do what it reasonably can to assist the market for legal expenses insurance to develop to its full potential.[2]' [emphasis added]

1 [2001] EWCA Civ 1117, [2001] 3 All ER 833.

2 Access to Justice with Conditional Fees (March 1998) at para 4.13.

B.16 Perhaps more significant are the figures produced by the Association of British Insurers on an annual basis which show somewhat lower coverage:

1998 12,843,298

1999 15,766,530

These are figures for BTE and do not represent any assertion that the number of individuals possessing BTE amounts to the same level. Clearly some individuals will have BTE attached both to a motor policy and to a contents policy. As at the end of November 2001 no figures subsequent to

1999 have been published.

B.17 The court in *Sarwar*[1] refers to figures for motor policies[2]. In 1999, 23.5 million motor vehicles were licensed and 9.9 million motor BTE policies were sold, representing a 42% penetration. A rough rule of thumb therefore would suggest that one in every two clients in motor cases would have BTE, either of their own or via the driver. It will remain to be seen whether as a result of the court's decision, liability insurers significantly increase the provision of BTE cover.

1 [2001] 4 All ER 541.

2 [2001] 4 All ER 541 at para [22].

Investigating documents

B.18 The court in *Sarwar*[1] anticipates that the BTE policy wording will be available and that the client's solicitor will read through it to determine its availability and suitability. Determining the existence of BTE can be achieved if the client has a renewal notice, a certificate of insurance or an invoice/receipt – the latter may come from a broker or from the insurer. Suitability of cover cannot be determined except from the policy wording applicable to the insurance. Where the client does not produce a policy wording it would be necessary for the client to obtain the wording before suitability of cover can be assessed and any decision as to how to fund the case is taken. The court gave no guidance as to what further steps should be taken nor any time scale for such steps.

1 [2001] 4 All ER 541.

The effect of inaccurate information

CLIENT RISK

B.19 Where BTE cover is available and suitable in a road traffic case valued at less than £5,000 it is clear that an ATE premium will not be recovered in costs. Where a client mistakenly concludes that they have no such cover it is not clear what the result will be for the ATE premium. The court suggests the sort of inquiry which the questionnaire at para **B.12** above, facilitates. If after such inquiry the client mistakenly concludes that they have no BTE cover then the reasonableness of purchasing ATE cover and entering into a CFA with success fee ought to be judged in the light of the steps which have been taken. A client in such circumstances will rely on the CPD:

> **11.7**
>
> Subject to paragraph 17.8(2), when the court is considering the factors to be taken into account in assessing an additional liability, it will have regard to the facts and circumstances as they reasonably appeared to the solicitor or counsel when the funding arrangement was entered into and at the time of any variation of the arrangement.

SOLICITOR RISK

B.20 The court in *Sarwar*[1] addressed only the question of fault in terms of a solicitor's duty of care. The court said that any advice given will necessarily be based on the information provided by the client and that advice based upon inadequate or inaccurate information, whilst unsound, will not indicate fault[2].

1 [2001] 4 All ER 541.

2 [2001] 4 All ER 541 at para [51].

B.21 There are, however, serious questions as to risk which this does not answer. Where a client has purchased ATE insurance on the mistaken basis that there is no BTE, the client has a liability for the premium. In many cases the premium will be deferred or funded so that there is still a real question as to payment (or repayment of a loan). There will be circumstances in which the solicitor will in some form or other be carrying the premium as a disbursement liability. In these circumstances clearly there is a real risk of financial loss irrespective of the matter of negligence.

B.22 Equally a solicitor who has entered into a CFA with a success fee may be faced later with evidence of available and suitable BTE which the early inquires did not discover. As with the client's position as to premium, such a solicitor will seek to rely upon CPD, s 11.7 (above) as to the reasonableness of entering into such a funding arrangement.

2 The terms of the BTE policy in Sarwar[1]

B.23 The BTE was with DAS, with the following important provisions highlighted by the court[2]:

- Driver and passengers covered.
- Passenger claims require the consent of the driver.
- Limit of indemnity £50,000.
- DAS entitled to 'full conduct and control of any claim or legal proceedings.'
- Insured's right to choose a lawyer only if proceedings are issued or there is a conflict of interest.

1 [2001] 4 All ER 541.

2 [2001] 4 All ER 541 at para [6].

3 Suitability of BTE cover[1]

B.24 The court's approach was to refer to available and suitable cover in road traffic claims valued at less than £5,000. It is a matter for judgment therefore as to whether in any particular case the available BTE is suitable for the particular client. The court gives no guidance here except with regard to passenger claims where the BTE available is possessed by the defendant.

1 See generally Chalk *Risk Assessment in Litigation: Conditional Fee Agreements, Insurance and Funding* (Butterworths 2001), Chapter 14.

B.25 The court summarised the position of a passenger faced with using this DAS policy taken out by the defendant driver he is suing:

> 'representation arranged by the insurer of the opposing party, pursuant to a policy to which the claimant had never been a party, and of which he/she had no knowledge at the time it was entered into, and where the opposing insurer through its chosen representative reserves to itself the full conduct and control of the claim, is not a reasonable alternative.[1]'

1 [2001] 4 All ER 541 at para [58].

B.26 There are, however, difficult circumstances other than this example. Whenever a claimant is a passenger in a vehicle involved in an accident there is a possibility that at some stage it will turn out to be necessary to blame, at least in part, the claimant's own driver. The court gives no guidance for these situations as to how to assess suitability where the only BTE cover available is that of the driver. The court refers to the limit of indemnity where there is more than one claimant on the policy as being a possible factor rendering use of the BTE unsuitable. A low limit together with multiple claims on that limit is likely to leave a client in the difficult position of looking for top up cover with an ATE insurer.

B.27 On an individual basis, the suitability of BTE cover will depend also on ensuring that cover was in place at the relevant time (date of accident , not date of claim) and that the type of claim to be pursued is covered by the policy. A household policy may for example exclude any claims for injuries sustained whilst a driver or passenger in a car. It is also necessary to consider whether the conditions laid down in the policy have been complied with, such as the time limit for notification of claims. BTE policies will give cover only where the insurer takes the view that there are reasonable prospects of success. It is difficult to see from the judgment how this factor can be accommodated in the question of suitability at the time the decision has to be made as to the use of ATE insurance. The Insurance Ombudsman Bureau's Bulletin 16 states: 'Disagreements over reasonable prospects make up a fair proportion of the legal expenses cases we consider every year.[1]'

1 IOB Bulletin 16.2 (1998).

4 Must BTE be used where it exists?

B.28 *Saruxr*[1] is concerned with claims for additional liabilities, in the form of insurance premiums, against losing opponents. Where BTE cover is available and suitable in a road traffic case valued at less than £5,000, any ATE premium will be irrecoverable. It is difficult to advise a client in these circumstances to not avail themselves of the BTE cover but instead to choose an ATE route at their own expense or to take the case without insurance cover at all.

1 [2001] 4 All ER 541.

B.29 The Solicitors Client Care Code, para 4(j) provides—

> 'The solicitor should discuss with the client how, when and by whom any costs are to be met, and consider:
>
> (iii) whether the client's liability for another party's costs may be covered by pre-purchased insurance and, if not, whether it would be advisable for the client's liability for another party's costs to be covered by after the event insurance ...[1]'

1 The *Guide to the Professional Conduct of Solicitors* (1999) 8th edn, Law Society Publications, para 4(j).

B.30 Although the *Sarwar*[1] decision is confined to insurance premiums, it is difficult to see that a CFA success fee would be recoverable where BTE insurance was available and suitable. Recovery must depend upon proportionality. Where BTE is available and suitable, a CFA with a nil success fee would of course in theory not add to the opponent's costs. It may be argued that a BTE insurer's costs claimed would be at a lower level. During the Court of Appeal hearing in *Sarwar* the court was shown a letter from DAS which stated that the insurer would not pay own costs in any event. On that basis there is a CFA , presumably with a nil success fee. It is at least arguable therefore that even where BTE is available and suitable, a client who chooses not to use that cover should be able to recover own solicitor costs but no success fee and no ATE premium. Whether such a position will be attractive to a client and the solicitor must be a question for them. It is clear from the experience of ATE insurers that many CFA cases are run without taking insurance. This appears to be done on the basis that the case is likely to settle without the need for the issue of proceedings. *Sarwar* may be seen to encourage this approach where a client does not wish to use their BTE insurer but this will cause difficulty when such a case does unexpectedly issue.

1 [2001] 4 All ER 541.

5 Freedom of choice of lawyer / use of panels

B.31 A common feature of BTE insurance is that the insurer will seek to control the choice of lawyer to be used. This level of control ensures that the costs liability of liability insurers is kept to a minimum, a major aim given the connection between liability insurers and the providers of BTE insurance. If the DAS letter referred to at para **B.30** above is accurate, the control over choice is also effective in ensuring that the BTE insurer incurs no own costs. The issue of freedom of choice of lawyer was addressed by the Insurance Ombudsman in 1993 in the context of the Insurance Companies (Legal Expenses Insurance) Regulations 1990[1]. The Ombudsman ruled that under the Regulations there is no freedom of choice of lawyer until commencement of proceedings unless there is a conflict of interest[2].

1 SI 1990/1159.

2 Annual Report 1993, paras 6.56–6.65.

B.32 The court was addressed on this issue but there is little in the judgment which reflects the arguments. In particular the court fails to address the crucial matter of when proceedings are to be considered commenced. The CPR provides for legal consequences to flow from pre-action conduct. There is nothing in the judgment, however, which could be said to lead to a conclusion other than that proceedings commence when a claim is issued in a court. There is indeed no analysis of the Council Directive 87/344/EEC nor of the Insurance Companies (Legal Expenses Insurance) Regulations 1990[1] which implement the Directive. The court having given a description of the relevant provisions of the Regulations concludes its treatment at paragraph [26]:

> 'It appears that the Insurance Ombudsman has consistently interpreted regulation 6(1) as meaning that the obligation to permit the insured to select a lawyer of his choice is triggered at the time when efforts to settle a claim by negotiation have failed and legal proceedings have to be initiated.'[2]

1 SI 1990/1159.

2 [2001] 4 All ER 541 at para [26].

B.33 At para [44] the court refers to a letter leaving the court uneasy about the terms on which a non-panel solicitor would be permitted to act under the DAS BTE policy. The letter stated that the solicitor would not be reimbursed for costs or disbursements in the event that the case failed. Such terms amount in effect to a conditional fee agreement with no success fee. It was not clear whether DAS enters into a CFA within the Courts and Legal Services Act 1990 and the Conditional Fee Agreements Regulations 2000[1]. It would seem that following the judgment and thus publicity to this arrangement, a solicitor entering into an arrangement of this kind must ensure that the funding agreement complies with the above provisions and that a written CFA is entered into. A failure to comply would leave the solicitor vulnerable on an assessment in a case that is successful. Arrangements for paying opponent's costs where a claim fails were not referred to in the DAS letter but it is necessary to ascertain whether the BTE insurer will meet this liability or whether it is expected that the solicitor will do so. Finally, it should be ascertained whether the BTE insurer will pay own costs where the case succeeds or whether the claimant's solicitors are restricted to recovered costs. If the latter is the case then careful consideration needs to be given, at least for the time being, to the indemnity principle. A solicitor who agrees to do work for recovered costs only could be met with the indemnity principle argument that no fees are payable at all.

1 SI 2000/692.

Use of panels

B.34 There are several references in the judgment to the use by BTE insurers of recommended panels of solicitors. At para [29] the court describes the practice of a major LEI insurer and repeats that insurer's

view that the use of panels enables it to control the costs incurred by the paying party. At para [37] the court refers to the arrangements of DAS in using 52 panel firms with 60 offices. As with much of the judgment there is again no analysis and it is assumed therefore that the court accepts all of these arrangements.

B.35 The court raises some concern at para [44] about the size of some BTE insurer's panels and refers also to the post-Woolf days as making it perhaps inappropriate to restrict choice of lawyer at the time the procedures in a pre-action protocol come to be activated. The court concludes however that these issues need not be decided in the current appeal.

Choice of lawyer outside of BTE cases / costs assessment

B.36 This issue arose in *Bensusan v Freedman*[1] and the decision of Senior Costs Judge Hurst in dealing with the costs consequences of a client's choice of lawyer. The decision relies upon *Wraith v Sheffield Forgemasters Ltd*[2], in concluding that there were no exceptional factors about this case to warrant the claimant choosing either a specialist solicitor or one located at a distance. Kennedy LJ in *Wraith* quoted from the judgment of Potter J in the lower court[3]:

> 'in relation to the first question, Were the costs reasonably incurred?, it is in principle open to the paying party, on a taxation of costs on the standard basis, to contend that the successful party's costs have not been 'reasonably incurred' to the extent that they have been augmented by employment of a solicitor who, by reason of his calibre, normal area of practice, status or location, amounts to an unsuitable or 'luxury' choice, made on grounds other than grounds which would be taken into account by an ordinary reasonable litigant concerned to obtain skilful, competent and efficient representation in the type of litigation concerned (cf the remarks of Malins V-C in *Smith v Butler* (1875) 19 LR Eq 473 at 475,[1874–80] All ER Rep 425 at 426, since when the test of 'necessity' has been replaced by that of 'reasonableness').
>
> However, in deciding whether such an objection is sustainable in practice, the focus is primarily upon the reasonable interests of the plaintiff in the litigation, so that, in relation to broad categories of costs, such as those generated by the decision of a plaintiff to employ a particular status or type of solicitor or counsel, or one located in a particular area, one looks to see whether, having regard to the extent and importance of the litigation to a reasonably minded plaintiff, a reasonable choice or decision has been made. If satisfied that the choice or decision was reasonable, it is the second question, What is a reasonable amount to be allowed?, which imports consideration of the appropriate rate or fee for a solicitor or counsel of the status and type retained. If not satisfied that the choice or decision was reasonable, then the question of 'reasonable amount' will fall to be assessed on the notional basis of the costs reasonably to be allowed in respect of a solicitor or counsel of the status or type which should

have been retained.[4]" (Potter J's decision on the facts was reversed by the CA).

1 [2001] All ER (D) 212, SCCO Case No 0104797 of 2001.

2 [1998] 1 All ER 82 [1998] 1 WLR 132, CA.

3 [1996] 2 All ER 527.

4 [1996] 2 All ER 527 at 534.

B.37 On the matter of distance, the local court rates in Cheshire were in fact lower than those in Kent and therefore the paying party received an advantage, one which it seems, from the decision, was not to be taken into account however when assessing the costs of the Part 8 hearing. (The defendant was represented by a central London solicitor at grade 1 for the Part 8 proceedings). In the context of the decision in *Sarwar v Alam*[1] (above) requiring the use of the BTE insurer's choice of solicitor there may be some difficulty where the insurer instructs a panel solicitor other than one near to the claimant's home. The *Wraith*[2] case involved the practice of a trade union in instructing London solicitors for all its work, a not uncommon practice and one shared by defence bodies and defendant insurers.

1 [2001] 4 All ER 541.

2 [1998] 1 All ER 82 [1998] 1 WLR 132, CA.

C Questions and Answers

SUCCESS FEES

C.1

Q Can a success fee be set as soon as a client instructs a solicitor?

A It depends: *Callery* approves of this approach but *Sarwar* requires enquiry of BTE insurance. If BTE is available and suitable it must be used in preference to a CFA with success fee.

Q Does *Callery* limit the success fee in RTA cases to 20%?

A It imposes a 20% limit on success fees set at the outset without reference to a response from the opponent.

Q Does *Callery* apply to non-RTA cases?

A There are statements of principle which will apply outside of RTA cases. Thus success fees can be set at the outset and a success fee can reflect the fact that other cases may lose. The case of *Bensusan v Freedman* is an illustration of how the principles in *Callery* are likely to be used out side of RTA cases.

Q Can a success fee be set at the outset and then increased, up to a maximum 100%, or decreased in the light of a response from the opponent?

A The court in *Callery* did not address this method of setting a potentially variable success fee. It is submitted that this method is within the CFA Regulations. Client consent to the change of success fee is required as is compliance with Rule 15.

INSURANCE

C.2

Q Are ATE premiums recoverable in costs only proceedings?

A Yes. Section 29 of the Access to Justice Act 1999 applies to Part 8 costs only proceedings to make recoverable a premium in respect of substantive proceedings which in the event have never been issued.

Q Have benchmarks been set for premium levels?

A Master O'Hare's lengthy report found this to be impossible. The premium allowed on the facts in *Callery*, £350, is not intended as a benchmark.

Q Is a premium for both sides' cover fully recoverable?

A The court left open this question whilst allowing 'elements' of own costs cover in the CFA insurance policy taken out in *Callery*.

Q Must a solicitor check every ATE policy available in the market?

A The court in *Callery* did not go this far. It referred to the Law Society publication 'Litigation Funding' and to a commercial web-site 'the Judge.co.uk'.

Q Is an ATE premium to be assessed on the basis of how the premium is set by the insurer?

A No. The court rejected this approach in favour of assessing the benefits purchased by the premium.

Q Must a client always buy the cheapest policy?

A No. The premium allowed in *Callery* was not the cheapest. The number of variables involved from case to case and insurer to insurer preclude the possibility of knowing the lowest premium quotation that would actually be offered in any individual case.

Index

APPENDIX THREE

BUTTERWRTHS COSTS SERVICE

[see separate file]

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